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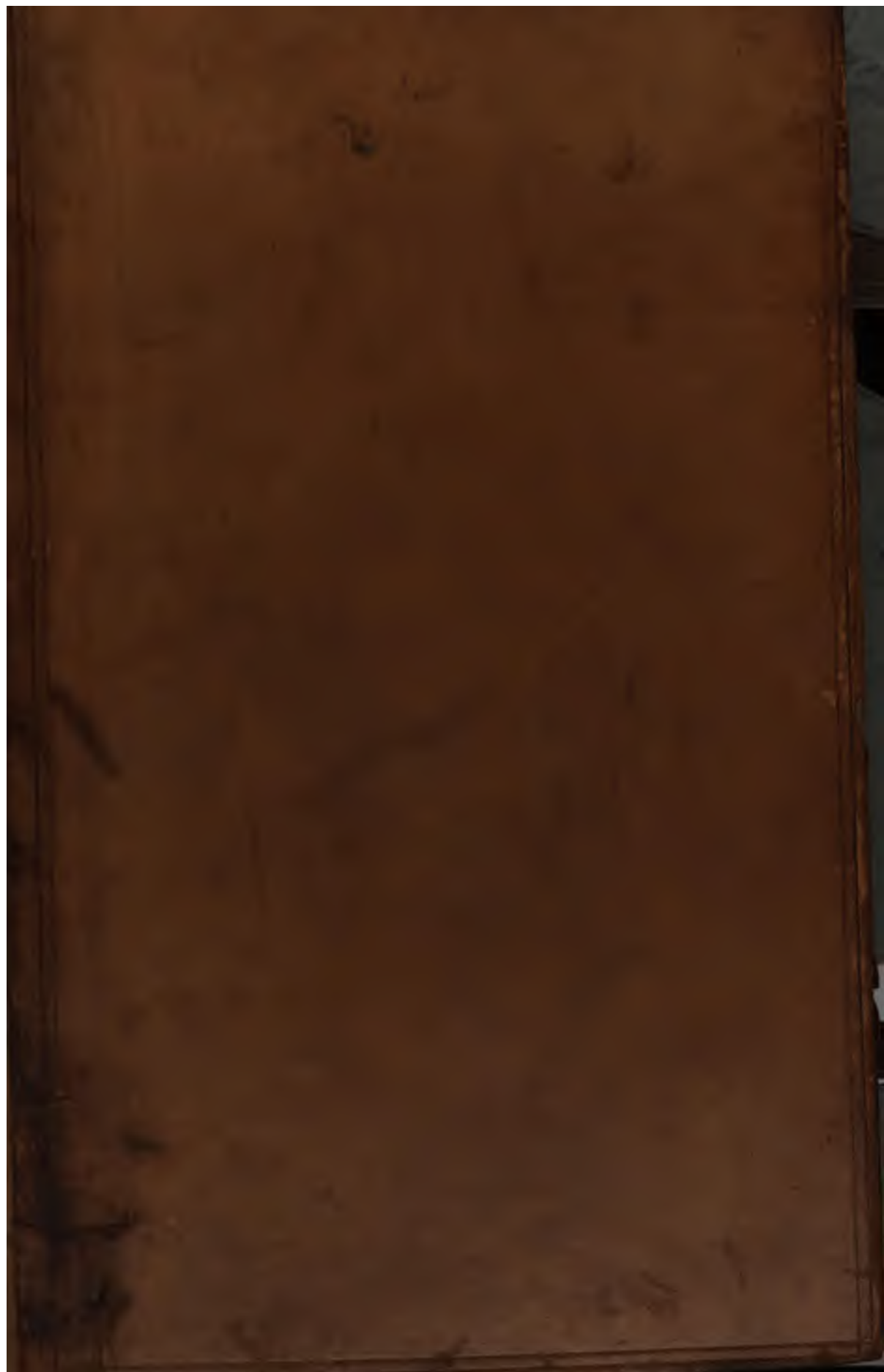
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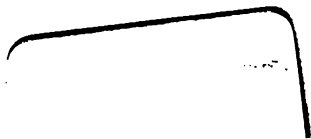


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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY,
DURING THE TIME OF
LORD CHANCELLOR SUGDEN.

BY
WILLIAM B. DRURY, AND ROBERT R. WARREN, ESQRS.,
BARRISTERS AT LAW.

VOL. IV.
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The Right Hon. Sir EDWARD BURTENSHAW SUGDEN, *Lord Chancellor.*

The Right Hon. FRANCIS BLACKBURNE, *Master of the Rolls.*

The Right Hon. THOMAS BERRY CUSACK SMITH, *Attorney General.*

RICHARD WILSON GREENE, Esq., *Solicitor General.*



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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

COLE v. SEWELL.

1842.

June 6.

1843.

April 21, 25,
27.

BY indenture bearing date the 30th of December, 1749, made between *Francis Lord Athenry* and *Ellis Lady Athenry*, his wife, of the first part; *Thomas Bermingham*, afterwards Lord *Athenry*, and Earl of *Louth*, the only son of the said *Francis Lord Athenry*, of the second part; *Peter Daly*,

By a settlement, lands were limited to trustees, to the use of the settlor for life, with remainder, subject to a term of ninety-nine years, to

the use of his three daughters, for their lives, as tenants in common, with remainder to trustees, during the life of each daughter, to preserve contingent remainders, with remainder as to the share of each daughter, at her death, to the use of her first and other sons successively in tail male, with remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor during their or her respective lives and life, with remainder, in like manner, as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male, with remainder, in case all the daughters should die without issue male, as to the share of each, to the use of the daughters as tenants in common in tail; and in case one or more of the daughters should die without issue, it was provided, that the share or shares of such daughter or daughters, should go to the use of the daughters of such survivors or survivor, as tenants in common in tail general: the ultimate remainder was limited to the use of the settlor in fee:—

Held, that the limitation, in case of the failure of issue generally of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and not void for remoteness.

Held, also, that the words “survivors or survivor,” were to be read “others or other,” and, consequently, that the limitation over to the daughters of one of the settlor’s daughters who had issue, was not defeated by the death of that daughter in the life-time of another, who subsequently died without issue, but that the limitation took effect as a good cross remainder.

A limitation by way of remainder cannot be void for remoteness.
General powers of sale and exchange in a settlement are good.

1842.

COLE

v.

SEWELL.

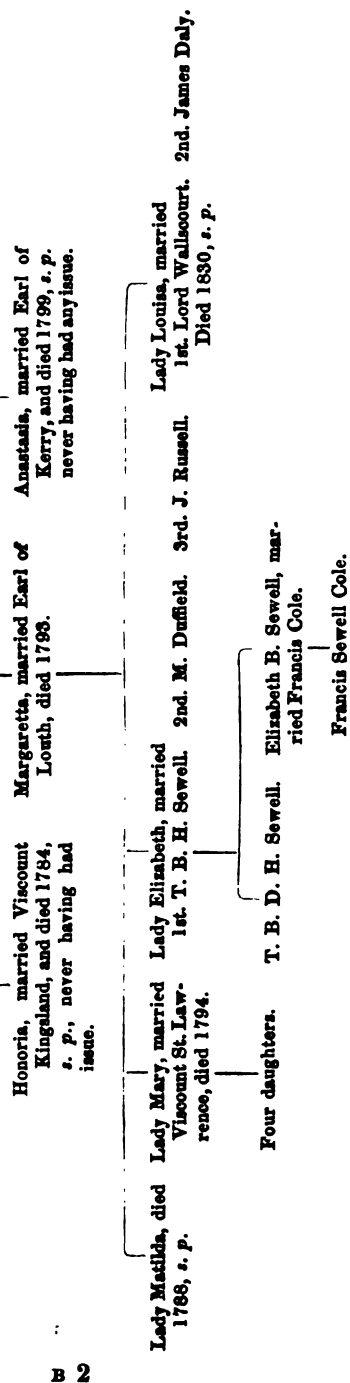
Statement.

and *Margaret Daly*, his daughter, afterwards Lady *Athenry* and Countess of *Louth*, of the third part; *John Brown*, and *James Agar*, of the fourth part; and *Denis Daly*, and *James Daly*, of the fifth part; being the settlement executed upon the occasion of the intermarriage of *Thomas Bermingham* and *Margaret Daly*, after reciting as therein, certain estates, called the *Bermingham* estates, were limited, as to certain parts thereof, to *Francis Lord Athenry* for life, with remainder to *Thomas Bermingham* for life; and as to the residue of the same estates, to the use of *Thomas Bermingham* for life, with remainder, as to the whole of the estates, to the use of the first and other sons of *Thomas Bermingham* and *Margaret Daly*, successively, in tail male, with remainder to the first and other sons of *Thomas Bermingham* successively in tail male, with remainder to the daughters of *Thomas Bermingham* and *Margaret Daly*, in tail general, with remainder to the use of the right heirs of *Francis Lord Athenry*.

Peter Daly had three daughters, viz., *Honoria*, afterwards Viscountess *Kingsland*, *Anastasia*, Countess of *Kerry*, and the said *Margaret* or *Margaretta*, Lady *Athenry*; but not any male issue. *Francis Lord Athenry* died in the year 1750, leaving the said *Thomas Bermingham*, who then became Lord *Athenry*, his only son, him surviving.

PEDIGREE.

PETER DALY.



1842.
 }
 COLE
 v.
 SEWELL.
 —
 Statement.

1842.

COLE

v.

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Peter Daly, previously to, and in the year 1752, was seised in his demesne as of fee, of the lands comprised in the next mentioned deed, which were called the Quansbury or Daly estate; and being so seised, by indenture bearing date the 5th of February, 1752, and made between *Peter Daly*, of the first part, the said *Thomas Lord Athenry*, and *James Daly*, of the second part, and *Malachy Daly*, and *Ignatius Blake*, of the third part; it was witnessed, that the said *Peter Daly*, for the purpose of settling the said lands to the uses hereinafter mentioned, subject to the dower of *Elizabeth Daly*, his wife, and in consideration of natural love and affection for his said daughters, *Honoria*, *Anastasia*, and *Margaretta*, granted and released the said Daly estates to *Thomas Lord Athenry* and *James Daly*, and their heirs, to the use of *Peter Daly* for his life, without impeachment of waste, with remainder (subject to the dower of *Elizabeth Daly*, his wife) to the use of the said *Malachy Daly* and *Ignatius Blake*, their executors, &c., for a term of ninety-nine years, with remainder, subject to the trusts of that term, to the use of his said daughters, *Honoria*, *Anastasia*, and *Margaretta*, for their respective lives, as tenants in common, and not as joint-tenants, share and share alike, with remainder to trustees to preserve contingent remainders, with remainder to the use of the respective first and other sons of the respective bodies of the said *Honoria*, *Anastasia*, and *Margaretta*, lawfully to be begotten, severally and successively, and of the several and respective heirs male of their several and respective bodies, severally and successively.

By this deed it was then declared, that if any one or two of the said daughters of the said *Peter Daly*, should happen to die without issue male of her or their body or bodies, then, as to such part or parts of the said estates of

her or them so dying without issue male, the same should stand limited to the use of the survivors or survivor of his daughters, the said *Honoriam, Anastasia, and Margaretta*, share and share alike, as tenants in common in case of two survivors, during the respective lives or life of such survivors or survivor, and after the determination of the respective estates or estate of such survivors or survivor, remainder to the use of trustees to preserve, &c., remainder to the use of the respective first and other sons of the respective bodies or body of such survivors or survivor, severally and successively in tail male; and in case the said *Honoriam, Anastasia, and Margaretta*, should happen to die without issue male of their bodies, then, as to their respective shares and proportions of the said estates, to the use of all and every their respective daughters, share and share alike, as tenants in common, and not as joint-tenants of the respective shares of their said respective mothers, and the heirs of the body and bodies of any such daughter and daughters, lawfully to be begotten; and in case one or two of the said daughters of the said *Peter Daly* should happen to die without issue of her or their body or bodies, then, as to the share or shares of the said estates of such daughter or daughters, so dying without issue, to the use and behoof of all and every the daughter and daughters of such survivors or survivor, share and share alike, as tenants in common, and not as joint-tenants of the respective shares of such survivors, in case of two survivors, to the daughter and daughters of such survivor, in case there should be but one survivor, as tenants in common, and not as joint-tenants, and the heirs of the body and bodies of all and every the daughter and daughters of such survivors or survivor; and in case the said *Honoriam, Anastasia, and Margaretta* should happen to die without issue, then to the use of *P. Daly*, the

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third son of *James Daly*, for life, with divers remainders over, with the ultimate limitation to the right heirs of *Peter Daly*, the settlor.

Peter Daly died shortly after the execution of the last mentioned deed, intestate, without having made any disposition of the reversion in fee of the *Daly* estates, which descended on his said three daughters in fee, as his co-heiresses at law.

Honoria Lady Kingsland, and *Anastasia Countess of Kerry*, never had any issue: *Margaretta Lady Athenry* and Countess of *Louth*, had not any male issue, but she had four daughters, viz., *Matilda*, *Mary*, *Elizabeth*, and *Louisa*.

Lady *Matilda Bermingham* died in 1788, in the life-time of her mother, intestate, unmarried, and without issue.

Lady *Mary Bermingham* married Viscount *St. Lawrence*, and had issue four daughters.

Lady *Elizabeth Bermingham* was married three times; first, to *Thomas Bailey Heath Sewell*; secondly, to *Michael Duffield*, and thirdly, to *Joseph Russell*.

Lady *Louisa Bermingham* married, first, Lord *Walls-court*, and afterwards *James Daly*.

By indenture bearing date the 23rd of February, 1779, and made between the said *Thomas B. H. Sewell* and Lady *Elizabeth Sewell* (subsequently to their intermarriage), of the first part, and several sets of trustees of the other parts, after reciting the said indentures of the 30th of December,

1749, and 5th of February, 1752, and that by virtue of said indentures, or by other means, the said Lady *Elizabeth Sewell* was seised, or entitled, in remainder or reversion expectant upon, and to take effect in possession, after the determination of certain prior uses and limitations of or to several parts, shares, and properties of and in the lands and hereditaments thereafter mentioned; and reciting, that by a certain postnuptial settlement dated the 15th of June, 1776, which recited the said title of the said Lady *Elizabeth Sewell*, and her desire to settle and assure her said parts or shares in remainder or reversion in the said lands, and further reciting, that by said deed of 1776 it was witnessed, that for carrying the said desire into execution, and in order to bar, dock, and destroy the estate in remainder or reversion, expectant and to take effect as aforesaid, then vested in her, of the said shares of the said hereditaments, but without prejudice to the uses or limitations precedent to the said remainders or reversions, the said *Thomas B. H. Sewell* and Lady *Elizabeth Sewell* covenanted to levy a fine or fines of her said parts or shares in remainder or reversion, and that such fine or fines, &c., should enure to the uses following, that is to say, that so soon as the hereditaments comprised in the said settlements of 1749 and 1752 should fall into possession, by the determination of the prior estates therein respectively mentioned, *Matthew Lewis* (the trustee of the inheritance), his heirs, and assigns, should, yearly, during the joint lives of the said *T. B. H. Sewell* and Lady *Elizabeth Sewell*, take out of the hereditaments which should first fall into possession, a rent-charge of 300*l.* per annum, and also out of the other hereditaments which should next fall into possession, the further rent-charge of 300*l.* per annum, to be paid to Lady *Elizabeth* for her separate use, and, subject to said annuities, to the

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use of *Thomas B. H. Sewell* for his life, with remainder to the use of Lady *Elizabeth Sewell* and the heirs of her body; and further reciting, that no fine had been levied in pursuance of the indenture of 1776, and reciting that there was issue of said *T. B. H. Sewell* by Lady *Elizabeth*, two children, viz., *Thomas Bermingham Daly Henry Sewell*, and *Elizabeth Blake Sewell*; and reciting that *T. B. H. Sewell* was indebted to certain scheduled creditors to the amount of 6547*l.* 4*s.* 6*d.*, the greater part of which had been contracted on account of Lady *Elizabeth Sewell*, and that being desirous, with the consent of the said *T. B. H. Sewell*, to secure the payment of said debts, and also to make some provision for her said two children, and subject thereto, to settle and assure her parts or shares of said lands and hereditaments for the benefit of her said two children, and such other children as she might thereafter have, she had agreed to settle the same and all her right and interest in the premises to the uses thereafter declared; it was thereby witnessed, that in order to carry into effect said intention, and to bar the estate tail in remainder or reversion, expectant upon, and to take effect as aforesaid, then vested in her, the said Lady *Elizabeth Sewell*, in the hereditaments comprised in the said deed of 1749 and 1752, without prejudice to the uses, limitations, or charges precedent to the said remainders or reversions, expectant or to take effect as aforesaid, then vested in her, except the uses of the deed of 1776, which were thereby relinquished, and to the intent that the said remainders or reversions, expectant upon, and to take effect as aforesaid, of or belonging to the said Lady *Elizabeth Sewell*, in the said lands, but subject, and without prejudice as aforesaid, might be limited and assured to the uses, and subject to the agreements thereafter declared, the said *Thomas B. H. Sewell* and Lady *Elizabeth Sewell*

covenanted to levy fines of all her undivided shares and properties in remainder or reversion, expectant and to take effect as aforesaid, and all and every the rights, titles, estates, and interests of Lady *Elizabeth Sewell* and of *Thomas B. H. Sewell*, in right of his said wife, in the said Birmingham and Daly estates, the said fines and other assurances then had, or thereafter to be had, to enure as to the parts, shares, properties, estates, and interests of the said Lady *Elizabeth*, in remainder or reversion, expectant and to take effect in possession as aforesaid, of and in the said several hereditaments and premises thereinbefore particularly mentioned, to the uses following, that is to say, to the use of trustees for a term of 1000 years, and subject thereto to other trustees for a term of 1500 years, and subject to said two terms to other trustees for a third term of 2000 years, and subject to said terms to the use of a trustee, in trust for the sole and separate use of Lady *Elizabeth Sewell*, for her life, then to the use of trustees for a term of 3000 years, and then to the use of *Thomas B. D. H. Sewell*, the said son of Lady *Elizabeth*, for his life, with remainder to trustees to preserve, &c., remainder to the first and other sons of *Thomas B. D. H. Sewell*, in tail, remainder to his daughters as tenants in common in tail, with cross remainders; remainder to the second and other sons of Lady *Elizabeth Sewell*, successively, in tail male, remainder to *Elizabeth Blake Sewell*, and her daughter and daughters, as tenants in common in tail.

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This deed did not contain any limitation of the ultimate reversion; and it was by this deed declared that it should not enure to any of the uses or trusts of the deed of 1776. The trusts of the four terms were declared as follows, viz.: that for 1000 years, to raise the said sum of 6547*l.* 4*s.* 6*d.*;

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that for 1500 years, to raise 5000*l.* for Lady *Elizabeth Sewell*; that for 2000 years, to secure an annuity of 100*l.* per annum out of the lands, which should first fall into possession, and a further annuity of 100*l.* per annum out of the lands, which should next fall into possession, to be payable during the joint lives of *T. B. H. Sewell* and Lady *Elizabeth*, for the maintenance of their son, *T. B. D. H. Sewell*, during his minority; and the term of 3000 years, to raise 3000*l.* for the portion of *Elizabeth Blake Sewell*, and also a sum of 4000*l.* for any other younger children of Lady *Elizabeth*; and the deed also contained a covenant on the part of *T. B. H. Sewell*, that in case Lady *Elizabeth*, and her said two children, and all other children whom she might have, should happen to die without issue, before the said Earl of *Louth*, or before the death of the survivor of the said three daughters of *Peter Daly*, viz., *Margaretta*, *Anastasia*, and *Honoria*, so that the term of 1000 years could not vest in possession, he would pay the said scheduled debts.

Shortly after the execution of this deed, in Easter Term, 1779, fines *sur conuzance de droit*, &c., with proclamations, were levied by Lady *Elizabeth* and Mr. *Sewell*, of the lands comprised in the deeds of 1749 and 1752.

Lady *Elizabeth* had not any other children. *Honoria* Lady *Kingsland* died in 1784; *Margaretta* Countess of *Louth* died in 1793, and *Anastasia* Countess of *Kerry*, the survivor, died in 1799; and *Thomas* Earl of *Louth* also died long previously to the institution of the present suit. All the said daughters of *Peter Daly* died intestate, and without having made any disposition of the reversion in fee of the *Daly* estates, which had vested in them by descent as above mentioned.

The trusts of the term of ninety-nine years, limited of the Bermingham estates by the deed of 1749, were satisfied many years before the institution of this suit; and, in 1834, a partition was made of that estate, and one-third of that estate, the share of Lady *Elizabeth Sewell*, was conveyed in severalty to the uses of the deed of 1779.

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A suit having been instituted for the partition of the Daly estate, comprised in the deed of 1752, in 1809 a decree was made, and by indenture dated the 30th of September, 1809, one-third of that estate, the share of Lady *Elizabeth Sewell*, was conveyed to a trustee to hold, upon the uses and trusts, on which the same stood, or were limited, immediately before the said decree for partition.

On the 14th of May, 1812, *Alexander Lanery*, and others, the representatives of the surviving trustee of the term of 1000 years, created by the deed of 1779, filed their bill in the cause of *Lanery v. Duffield*, for a sale of the lands comprised in that term, for the purpose of paying the scheduled debts thereby secured, and in this bill was set forth a claim and title to the whole of the lands allotted in severalty to Lady *Elizabeth Sewell*, then Lady *E. Duffield*, and a *feme sole*, as comprised in that term; in that cause, Lady *E. Duffield*, her son, *T. B. D. H. Sewell*, and his infant children, were defendants.

Lady *Elizabeth*, by her answer, insisted that only one-fourth of a third of the Daly estates was affected by the trusts of the deed of 1779, or comprised in the term, of 1000 years. In April, 1819, a decree was pronounced, by which it was referred to the Master to inquire and report, what lands were comprised in the term. The Master made his

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report in June, 1820, and thereby reported, that the trust term extended to the whole of the one-third of the Daly estates; this report was not excepted to, and was afterwards confirmed. On the 4th of July, 1820, a decree was pronounced for the sale of the whole or a competent part of the said one-third of the Daly estate allotted to Lady *Elizabeth* in severalty, and accordingly a part was sold.

Some doubts having arisen, as to whether three denominations of the Daly estates had been included in the term of 1000 years; by indenture bearing date the 1st of January, 1825, it was witnessed, that for the purpose of barring all entails, and settling the lands therein comprised, to certain uses, *John Nicholas* (the trustee of the deed of 1779), Lady *Elizabeth Sewell*, then *Russell*, and *Joseph Russell*, her husband, according to their estates and interests, conveyed all the denominations, all the Daly estates, which had been allotted in severalty to Lady *Elizabeth* by the deed of partition, and also an undivided third part of the Bermingham estate, to *Henry M. Millar*, as tenant to the *præcipe*, in order that two recoveries, with double vouchers, might be suffered of the said lands; and it was thereby covenanted, that the said recoveries should be suffered, and should, when suffered, enure, as to such of the said several divided and undivided parts, shares, and properties, lands and hereditaments, as were comprised in the indenture of the 23rd of February, 1779, to the uses in that deed mentioned, and in confirmation thereof, and of the term of 1000 years; and after reciting, that certain denominations of land, that is to say, Cloonfaghry, Cloonconey, and Derreen, of which this deed stated, that Lady *Elizabeth Russell* was, at the time of making the deed of 1779, seised in tail in remainder, or otherwise, were not comprised in

that indenture; and reciting the proceedings in the cause of *Lanery v. Duffield*, and that Lady *Elizabeth Russell* had agreed to make the said three denominations subject to the term of 1000 years, it was, by said deed of 1825, further declared and agreed, that the said recoveries should enure, as to the said denominations, to the use of the trustees of the term of 1000 years, and to confirm the sale thereof, and to give effect and validity to the decree of 1820, and the proceedings thereunder, and subject thereto, to such further and other uses as Lady *Elizabeth Russell* should, notwithstanding her coverture, by deed or will appoint; and as to, for, and concerning the lands and hereditaments which were comprised in the deed of 1779, to such further uses as had not been thereby declared concerning the same, as the said Lady *Elizabeth Russell* should, notwithstanding her coverture, by deed or will appoint.

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Two recoveries were accordingly duly suffered, as of Hilary Term, 1825, by Lady *Elizabeth* and *Joseph Russell*, in pursuance of the deed.

Joseph Russell afterwards died, in the life-time of his wife, Lady *Elizabeth*. *Elizabeth Blake Sewell* married *Francis Cole*, and had issue *Francis Sewell Cole*, the Plaintiff in the present suit. Lady *Elizabeth Russell* made her will, dated the 7th of August, 1834, and thereby devised all her real estate to her grandson, the said *Francis S. Cole*, and his heirs, and departed this life on the 23rd of February, 1838, leaving her son, *T. B. D. H. Sewell*, the principal Defendant in the present suit, her surviving.

The bill in the present suit was filed by *Francis Sewell Cole*, on the 28th of May, 1840, and he thereby claimed

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the whole of the one-third share of Lady *Elizabeth* in the Daly estate, except the one undivided fourth of that share, to which she was originally entitled.

Thomas B. D. H. Sewell, and his children, the Defendants in the case, on the other hand, claimed to be entitled to the whole of Lady *Elizabeth's* share of the Daly estate.

The cause first came on to be heard in Trinity Term, 1842, when the Lord Chancellor was pleased to direct a case to be sent to the Court of Common Pleas, for the opinion of the Judges, upon the following questions:—

First. Whether, at the time of the execution of the settlement of the 23rd of February, 1779, the said Lady *Elizabeth Russell* was entitled to any, and what estates or interests, vested or contingent, under and by virtue of the limitations of the settlement of the 5th of February, 1752?

Secondly. Whether, having regard to the settlements of the 30th of December, 1749, and 5th of February, 1752, any, and which of said estates and interests in the Daly estate, and what portion or portions thereof, passed under, or were bound by the said settlement of the 23rd of February, 1779, and the fines levied in pursuance thereof, and what was the effect of such settlement and fines on said Daly estate?

Thirdly. Whether any, and what portion or portions of the Daly estate, were, by the deed of the 1st of January, 1825, and the recoveries suffered in pursuance thereof, li-

mitted or made subject to the uses of the said settlement of the 23rd of February, 1779?

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The case was argued in the Court of Common Pleas in Hilary Term, 1843(a), and the following certificate was returned by the Judges:—

“ We have heard this case argued by counsel for both parties, and have considered it, and we are of opinion, that at the time of the execution of the settlement of the 23rd of February, 1779, Lady *Elizabeth Sewell* was entitled, under and by virtue of the limitations of the settlement of the 5th of February, 1752, to a vested remainder in tail, in one-fourth of her mother, Lady *Louth's*, one-third of the Daly estates, expectant upon the decease of her mother [and aunts, Lady *Kerry* and Lady *Kingsland*] (b), without issue male, and to a contingent remainder in tail in one-fourth of each of the respective one-thirds of her aunts, Lady *Kerry* and Lady *Kingsland*, of the said Daly estate, expectant upon their decease respectively without issue [and the decease of Lady *Louth*, without issue male] (b).

“ Secondly. Having regard to the settlements of the 30th of December, 1749, and the 5th of February, 1752, we are of opinion, that all the estates and interests, to which Lady *Elizabeth Sewell* was so entitled under the limitations of the settlement of 1752, passed under, and were bound by

(a) 5 Ir. L. R. 197.

(b) The answer to the first question did not contain the words between brackets, but it was admitted by counsel on both sides, that they

had been omitted by a mere clerical error, and the Judges of the Court of Common Pleas expressed their readiness to introduce them into the certificate.

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the settlement of the 23rd of February, 1779, and the fines levied in pursuance thereof.

“ Thirdly. We are of opinion, that the whole of the one-third of the Daly estate, which was allotted in severalty to Lady *Elizabeth Sewell*, by the partition (save only the three omitted townlands), was limited and made subject to the uses of the settlement of the 23rd of February, 1779, by the deed of the 1st of January, 1825, and the recoveries suffered in pursuance thereof.

“ JOHN DOHERTY.

“ ROBERT TORRENS.

“ NICHOLAS BALL.

“ J. DEVONSHER JACKSON.”

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The cause now came on to be heard upon this certificate.

Mr. *Serjeant Warren*, and Mr. *George Digges Latouche*,
for the Plaintiff.

The limitation over in the deed of 1752, in the event of the death of any of the daughters of *Peter Daly*, the settlor, without issue, is void for remoteness. There is not a previous limitation to the issue generally, but the previous limitations might all be exhausted, without a general failure of issue; for instance, there might be a daughter of a son of one of the daughters, who could not take under the preceding limitations, living at the time of the failure of the preceding estates. *Jack d. Westby v. Fetherstone(a)* is the only authority, which can be cited to sustain the limitation over; and the Court of Common Pleas, feeling that they were not at

(a) 2 Huds. & B. 320.

liberty to overrule that case, have followed its authority without hearing any argument. The case of *Jack d. Westby v. Featherstone* was decided in favour of the validity of the limitation, because the Court considered it to be a limitation by way of remainder. It is introduced by the word "remainder," and the language used by Chief Justice *Bushe*, in his judgment, proves that it was upon that ground that the case was decided. He says, "The next objection is, that the limitation to the daughters of *G. B. Whitney* is after a fee limited to *T. S. Whitney*, and therefore void; but it is, evidently, not a limitation intended to take effect after an estate in fee, but in place or substitution of a fee, if that estate should not vest. It could not be intended to be after failure of the heirs of *T. S. Whitney*, because it is to the daughters of *G. B. Whitney*, and their issue, who, in certain events, would be heirs of *T. S. Whitney*: if *T. S. Whitney* should have issue female only, and no issue male, then, and in that event only, he takes a fee; but in case of a failure of his issue generally (not in case of failure of his heirs), then the daughters of *G. B. Whitney*, and the heirs of their bodies are to take, and they are to take by way of 'remainder.' In construing a deed, we are to read words according to their legal signification; a remainder can only be after a particular estate thereby already limited, and the only particular estates, already limited by this deed, are estates to *T. S. Whitney*, and his first, and other sons; the Court should, therefore, refer the word 'remainder' to those previous limitations, after which an estate by way of remainder can be limited, and not to an estate in fee, after which it cannot be limited." The contingency upon which the remainder there was limited to take effect, was con-

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fin'd to the life-time of the first taker. Here, however, the contingency is not so confined, and, indeed, it is submitted, that the limitation is not a remainder at common law, but a shifting or secondary use.

[THE LORD CHANCELLOR:—The word “remainder” could not make any difference. In that case, as in the present, the limitation over was after a general failure of issue].

But, supposing the decision in *Jack v. Fetherstone* to be law, and to apply to the case before the Court, it remains to be considered, whether the contingent remainder is well limited, so as to carry the estate over by way of cross-remainder; the gift in default of issue of the daughters, and in terms, provides only for the issue of a survivor or survivors of the daughters; there is no gift of the share of a surviving daughter dying without issue to the issue of a daughter who previously died. Now here, *Anastasia Lady Kerry*, who died without issue, was the survivor; *Lady Elizabeth Sewell*, therefore, could not take any thing under this limitation. Cross-remainders cannot be implied in a deed; *Edwards v. Alliston*(a). The Defendants will contend, that the words “survivor” and “survivors” must be read “other” and “others,” and *Doe v. Wainwright*(b) will probably be relied on. That is a distinguishable case; there the gift over was “in case all the children should die without issue,” and the Court was of opinion it could not give effect to the word “all” without determining that there should be cross-remainders; and the whole context required that construction. Here the word is obviously

(a) 4 Russ. 78.

(b) 5 Term R. 427.

used in its primary sense, of one person outliving another. In *Edward v. Alliston*, Sir John Leach expressly admitted that there could not be any doubt as to the intention of the parties, which plainly required cross-remainders, and distinguished the case from *Doe v. Wainwright*, by the peculiar expressions in the latter case, “and so, *toties quoties*, as any of the said children should die without issue, until there should be only one child left.” There are no similar expressions in the present case, which, therefore, falls within the general rule of law; *Crowder v. Stone(a)*, *Milsom v. Audry(b)*, *Cromek v. Lumb(c)*.

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The deed of 1779, and the fines levied in pursuance of that deed, only comprised and affected the vested estates or interests of Lady *Elizabeth Sewell*; now, her vested interests, at that time, were confined to one-fourth of Lady *Louth's* one-third share of the Daly estates.

[THE LORD CHANCELLOR:—But does not a fine ransack the entire estate of conuzor in the lands, whether vested or contingent, and vest all in the conuzee, unless an intention to the contrary is clearly shewn?]

That proposition was certainly established by the case of *Doe v. Oliver(d)*, upon the principle, that when the interest accrues, it feeds the estoppel, but it was not so decided at the time this settlement was made; *Doe v. Martyn(e)*. The language of this deed demonstrates an intention to include only the vested shares. The deed, in its own recitals, and in its description of the recited deed of 1776,

(a) 3 Russ. 217.

(b) 5 Ves. 465.

(c) 3 Younge & C. 565.

(d) 10 Barn. & C. 181; 5 Man. & R. 202.

(e) 8 Barn. & C. 497.

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describes the expectant estates as "then vested in her," Lady *Elizabeth*, and in the operative part, the description is preserved, by the use of the words of reference, "as aforesaid," which cannot be referred to any other expression in the deed. The word "vested" has a clear and technical signification, and even had the words "as aforesaid" been omitted, the use of the word "vested" in the recitals, and the fact of Lady *Elizabeth* being seised, both of vested and contingent estates, would be sufficient to confine the operation of the deed to the estates then actually vested in her; *Simons v. Johnson(a)*.

The only remaining question relates to the effect of the deed of 1825, in connexion with that of 1779. It is contended, on the part of the Defendants, that it comprehended all the estates of which Lady *Elizabeth* was seised at the time of its execution; but the intention was, obviously, to confirm the deed of 1779, and to subject to the trusts of the term of one thousand years, the three denominations which had been accidentally omitted, and there is nothing to prevent the deed being construed according to the intention.

The questions involve so much difficulty, that this Court ought not to decide them upon the opinions of the Judges of the Common Pleas, but should send the case to another Court of Law.

Mr. *Moore*, Mr. *Brooke*, and Mr. *Pakenham*, for the Defendant, *T. B. D. H. Sewell*.

The objection that a limitation is void, as being too remote, only applies where such remoteness tends to a perpe-

(a) 3 Barn. & Ad. 175.

tuity ; a limitation, therefore, is never too remote, if it can be barred by the owner of a precedent estate ; for instance, a limitation expectant upon an estate tail, can never be void for remoteness, as the power of the tenant in tail defeats the tendency to a perpetuity ; the rule against perpetuities, consequently, cannot be applied to limitations by way of remainder at common law^(a) ; if the remainder is vested, there, of course, is no perpetuity ; if the remainder is contingent, it must vest, if at all, immediately on the expiration of the preceding estate. Suppose a limitation to *A.* for life, and if *B.* dies without issue, remainder to *C. D.* in fee, how can it be argued that such a limitation tends to a perpetuity ? It is not a limitation to take effect after a general failure of issue, but a limitation to take effect in the event of a failure of issue at a particular time. If *B.* dies without issue in the life of *A.*, *C. D.*'s estate at once takes effect, at *A.*'s death, and if not then, it can never take effect at all. The decision in *Doe v. Fetherstone*^(b) is precisely in point, and it may be observed, that that decision was confirmed, upon appeal, by the Court of Exchequer Chamber. The Court seems to have put the case upon the clear general ground of the limitation being a contingent remainder ; *Lampet's case*^(c), *Cholmley's case*^(d), *Beck's case*^(e).

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Assuming, then, that the limitation in question is not void for remoteness, are valid cross-remainders created by the deed of 1752 ? The word "survivor" must be read

- (a) How will this doctrine be affected by the Act 7 & 8 Vict. c. 76 ? Will the eighth section be held to avoid retrospectively, as shifting uses, limitations, which could have been only supported *ab initio* as contingent remainders ?
- (b) 2 Huds. & B. 338.
- (c) 10 Rep. 46, *b.*
- (d) 2 Rep. 50, *a.*
- (e) Cro. Car. 363 ; Litt. R. 159.

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“other;” *Doe v. Wainwright*(a), already referred to, is a strong authority upon this point; there the limitation was to the “surviving child or children,” an expression far more personal than the word “survivor” simply. *Edwards v. Alliston*(b) is quite distinguishable; in that case it was attempted to imply cross-remainders, between all the members of a class of persons; here it is only contended, that by the fair construction of the express words of a deed, cross-remainders have been created.

The next question is, what estates were included in the operation of the settlement of 1779? That deed commences with a recital of the deed of 1752, and this would, therefore, seem to indicate a clear intention to pass all that was included in that deed. The covenant at the conclusion of the deed of 1779, by *Thomas B. H. Sewell*, providing, that in the event of a total failure of the issue of Lady *Elizabeth Sewell*, before the decease of the survivor of the three daughters of *Peter Daly*, so that the term of one thousand years could not vest in possession, he would pay the scheduled debts, proves, that the parties had in their contemplation the contingencies, in which it would happen that Lady *Elizabeth* would acquire an enlarged interest in the estates; and, indeed, there was not much difference in point of probability as to the vesting in actual possession of the vested and contingent estates, for the deed of 1752 had been executed twenty-seven years previously, and neither Lady *Kerry*, nor Lady *Kingsland*, had, or were likely to have, any issue. The deed contains words amply sufficient to convey all the estates and interests, vested or contingent, which Lady *Elizabeth* had. A fine was levied; that

(a) 5 Term R. 427. See also (b) 4 Russ. 78.
Cursham v. Newland, 2 Beav. 145.

fine was to operate upon her "parts, shares, and properties, right, titles, estates, and interests, in remainder, or reversion." Why should the Court suppose that any distinction was taken between "estates in remainder" vested, and "estates in remainder" contingent? Why exclude the latter from the operation of the general and express words of the deed? But the use of the terms "vested," in the recital, and "as aforesaid," in the operative part, is relied on. Now, the word "expectant," which is as technically applicable to contingent remainders, is also used in the recitals; the words "as aforesaid," may be taken in reference to "expectant," and the Court will not adopt any other reference, for the purpose of defeating the very general and extensive words of the deed.

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The deed of 1825 had the effect of fettering with the trusts of the settlement of 1779 the whole of the one-third of the Daly estate, which, under the decree for partition, had been conveyed in severalty to Lady *Elizabeth Sewell*. The decree in the cause of *Lanery v. Duffield* is recited without objection or impeachment. Now, under that decree, there had been an especial reference to ascertain the premises comprised in the term of one thousand years, created by the deed of 1779, and the result of that inquiry was a report, that it included the whole of Lady *Elizabeth's* one-third, and that report was not excepted to; the recital, therefore, of that decree, amounts to an implied approbation of it, particularly, when the omission of three denominations from that term was the very subject of the deed of 1825. By the deed of 1779, the reversion in fee, which descended from *Peter Daly*, had not been disposed of; and the power, which is reserved to Lady *Elizabeth* by the deed of 1825, relates to that reversion. This construction of the

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deed of 1825 renders it immaterial, whether the deed of 1779 did or did not operate upon the then contingent estates of Lady *Elizabeth Sewell*.

Mr. *Latouche*, in reply.

Mr. *Fearne's* authority is distinct upon the question whether a limitation by way of remainder can be too remote; he says(*a*), "Any limitation in future, or by way of remainder, of lands of inheritance, which, in its nature, tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our Courts considered void in its creation." And again, speaking of executory devises, to take effect on a failure of issue, he says(*b*), "If the limitation rests solely upon the usual extent and import of those words, the limitation over is too remote, and therefore void."

With respect to the word "survivor," the Court will lean against the construction contended for. In *Leeming v. Sherratt*(*c*), Sir *James Wigram* refused to construe "survivor" "other;" and in *Davidson v. Dallas*(*d*), Lord *Eldon* said, it was a forced construction(*e*).

April 27.

Judgment.

THE LORD CHANCELLOR :—

In this cause, I sent a case to the Judges of the Court of Common Pleas, for their opinion upon certain questions of

(*a*) Page 502.

(*b*) Page 485.

(*c*) 2 Hare, 14.

(*d*) 14 Ves. 576.

(*e*) The first point in this case, viz. : Whether a limitation by way

of remainder can be too remote, has recently been the subject of considerable discussion; Lewis on Perpetuities, 495; Jarman on Wills, vol. ii. 727; 8 Jurist, part ii. pages 22, 288.

law, arising out of a settlement, and the Judges having returned their certificate, the questions have been argued before me at great length, but not at greater length than the difficulty of some of them justified. I have considered the case with great attention, and I am now prepared to state the conclusions at which I have arrived.

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The facts are somewhat complicated, particularly from the state of the family, as connected with the devolution of the different shares of the daughters. There were two estates, one was settled in the usual way, with uses regularly limited, and in regard to which no question arises, except that an argument has been founded upon them, bearing upon the construction of the settlement of 1779. The settlement of 1752, upon which the main question of law depends, was a settlement of certain estates to the use of the father, *Peter Daly*, for his life, subject to dower for *Elizabeth*, his wife; remainder, after a term to which I need not particularly advert, to the use of his three daughters, as tenants in common for life; remainder to trustees to preserve, &c., with regular remainders, as to the several shares of his daughters, to their respective sons successively in tail male, as tenants in common. Then follows a regular limitation over, upon which some argument has been founded, but which, in my opinion, cannot be sustained in point of law, because this regular limitation over in case of default of issue male of the daughters cannot affect the construction of the subsequent limitations over. The limitation in default of issue male of the daughters is, as to their respective shares, to the use of their respective daughters as tenants in common in tail. So far there can be no question.

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Then comes the first clause, upon which the great question arises ; “and in case one or two of the said daughters of the said *Peter Daly* should happen to die without issue of her or their body or bodies, then as to the share or shares of the lands and premises aforesaid of such daughter or daughters so dying without issue, to the use of all and every the daughter and daughters of such survivors or survivor, share and share alike, as tenants in common, and not as joint tenants, of the respective shares of such survivors, in case of two survivors, to the daughter and daughters of such survivor, in case there be but one, as tenants in common, and not as joint-tenants, and the heirs of the body and bodies of all and every the daughter and daughters of such survivors or survivor ; and in case the said *Honorio Lady Kingsland, Anastasia Daly, and Margaretta Lady Athenry*, should happen to die without issue, then to the use of *Peter Daly, &c.* ;” that is to say, with cross-remainders between the daughters in tail, provided the limitation be good. I do not understand that the validity of this limitation is disputed, except upon two grounds. First, it is said, that this is not a good contingent remainder at all, but a shifting or secondary use, and, being limited to take effect upon a general failure of issue, it is too remote ; and secondly, that it is not a good cross-remainder, for it was said, that the word “survivors” must be construed literally, and cannot be read “others.” The question then arises, first, generally, is this a good contingent remainder ? and secondly, is there a good contingent remainder, so as to carry the estate by way of cross-remainder over to the issue of the daughter, who died in the life-time of the sisters, leaving issue ?

The first question depends upon this ; the first limi-

tation being only to the issue male of the daughters, which of course would not include issue female of the sons of the daughters; and the next limitation, although to the daughters of the daughters in tail, not exhausting the whole line of the issue of the daughters, the gift over is beyond the natural termination of the preceding limitations, because the gift over is only to take effect in case of the daughters dying without issue of their bodies generally, and there is no preceding limitation embracing the whole line of the daughters' issue. It is said this is not a good contingent remainder, and that *Jack d. Westby v. Fetherstone(a)* is not an authority, and the counsel for the Plaintiffs have endeavoured upon this point to sustain a distinction between the cases, by the aid of certain passages of the judgment delivered in that case; but, notwithstanding those expressions, I am clearly of opinion, that the Judges in *Jack v. Fetherstone* meant to decide the abstract legal proposition, and I must consider it as an authority. It is said, however, that in the present case, this is not a contingent remainder, but a future, or secondary, or springing use, and being to take effect in default of issue generally, it is too remote, and therefore void.

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Now, if there be one rule of law more sacred than another, it is this, that no limitation shall be construed to be an executory or shifting use, which can by possibility take effect by way of remainder, and the case of *Carvadine v. Carvadine(b)*, explained in the note to *Gilbert(c)*, establishes this position. In that case, Lord Keeper *Henley* went much out of his way to apply the rule; he transposed the proviso, and put the gift in a regular course of limitation,

(a) 2 Huds. & B. 320.

(b) 1 Eden, 27.

(c) Page 173 (n.)

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in order to give effect to it as a contingent remainder; he laid down the general rule in the strongest terms, and with precision, and I consider the rule to be one of universal application.

As to the question of remoteness, at this time of day, I was very much surprised to hear it pressed upon the Court, because it is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question: for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries, or for all time; or it is a contingent remainder, and then, by the rule of law, unless the event, upon which the contingency depends, happen, so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the rule as to perpetuity, which is a comparatively modern rule (I mean of recent introduction, when speaking of the laws of this country), was not known, so that, while contingent remainders were the only species of executory estate then known, and uses, and springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavoured to avoid remote possibilities; but since the establishment of the rule as to perpetuities, this has long ceased, and no question now ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting, or secondary use, not depending on an estate tail, and if it is so limited, that it may go beyond a life or lives in being, and twenty-one years, and a few months, equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder, it must take effect,

if at all, upon the determination of the preceding estate. In the latter case, the event may or may not happen, before, or at, the instant the preceding estate is determined, and the limitation will fail, or not, according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder. If the remainder over had been regularly in default of issue male of the daughters, it would have taken effect, when and if that failure happened. Now the remainder over is in default of issue generally, but it can only take effect, when and if there is a failure of issue male, that is, upon the regular determination of the previous estate; there is no distinction in point of perpetuity between the limitations; either can only take effect at the same period. The simple distinction is, that although the event happen, the latter gift—depending upon the contingency—may never take effect; but that introduces no question of remoteness.

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What other objection, then, can be taken to this as a contingent remainder? This limitation appears to me to be one of the most regular, technical, contingent remainders, that can be conceived. The estate is first limited to the daughters for their respective lives, with remainder to their sons in tail male, with remainder to the daughters of the daughters in tail general; and then, if the daughters die without issue, remainder over. What can be more regular? If the remainder over take effect at all, it must take effect immediately upon the natural determination of the preceding estates: for if at the time of failure of issue male of the daughters, there should also be a failure generally of their issue, then the preceding limitations are subsisting up to the

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time, at which the contingent remainder over is limited to take effect, and are only exhausted at that moment; and supposing that at the determination of those preceding limitations, there are other issue of the daughters—issue female of their sons, for instance, who do not take estates under those preceding limitations, then the contingency does not happen, upon which the remainder was to take effect, although the preceding estates are determined, and the remainder over is consequently destroyed. The limitation, therefore, plainly falls under Mr. *Fearne's* second class of contingent remainders, which is thus defined: “Where some uncertain event, unconnected with, and collateral to, the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder. As if a lease be made to *A.* for life, remainder to *B.* for life, and if *B.* die before *A.*, remainder to *C.* for life: here the event of *B.'s* dying before *A.* does not in the least affect the determination of the particular estate, nevertheless, it must precede and give effect to *C.'s* remainder; but such event is dubious; it may or may not happen, and the remainder depending on it is therefore contingent”(a). This example is a clear contingent remainder, but the preceding estates will not determine until their natural expiration.

Mr. *Fearne* then puts this case taken from *Leonard*(b); “So, if lands be given to *A.* in tail, and if *B.* come to Westminster Hall such a day, to *B.* in fee. Here *B.'s* coming to Westminster Hall has no connexion with the determination of *A.'s* estate; but as it is an uncertain event, and the remainder to *B.* is not to take place, unless it should happen, such remainder is, therefore, a contingent remainder.” Now,

(a) Page 6.

(b) 4 Leo. 237.

this must be read thus : “ If *B.* come to Westminster Hall such a day, remainder to *B.* in fee ;” for *B.*’s estate was not intended to take effect in derogation of the preceding estate ; it was the case of a limitation to one in tail, and after the determination of that estate, if *B.* should come to Westminster Hall on a given day, then to another. What is that but a regular limitation after the determination of the preceding estate, but depending upon a collateral event ? Is not that exactly this case ? The limitation here is to a particular class of the issue of the daughters, and a gift over, if the daughters die without issue generally. The contingency here, then, is the death of the daughters without issue. Is there any objection to the nature of this contingency ? The previous estates are to continue until their natural determination ; the remainder over depends on an event collateral to the determination of the previous estates. The nature of that collateral event is unimportant. Whether it be a dying without issue, a particular tree standing or falling, a party coming to Westminster Hall, or whatever be the event, on which a man in his caprice may choose to rest the contingency, upon which the limitation over is to take effect, is perfectly indifferent.

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The first instance of *Mr. Fearne* is taken from *Coke Littleton(a)*, and the passage shews there was then a difficulty about remote possibilities, which does not exist at this moment. Lord *Coke*, speaking of this, says : “ So it is if a man make a lease for life to *A.*, *B.*, and *C.*, and if *B.* survive *C.*, then the remainder to *B.* and his heirs : here is another exception out of the said rule, for albeit the

(a) Co. Litt. 378, a.

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person be certain, yet inasmuch as it depends upon the dying of *B.* before *C.*, the remainder cannot vest in *C.* presently: and the reason of both these cases in effect is, because the remainder is to commence upon limitation of time, viz. upon the possibilitie of the death of one man before another, which is a common possibilitie." The concluding words shew, that in those early times they were looking to the period when the contingency might arise. The effect, however, of the modern rule against perpetuities has been to render this doctrine obsolete, although it has rendered void successive life estates to successive unborn classes of issue. In *Nicholls v. Sheffield*(a) the Court held that a proviso for shifting an estate after an estate tail was valid; and Lord *Kenyon*, who was then at the Rolls, would not listen to an argument founded on remoteness, because the limitation over might at any time be barred by the previous tenant in tail.

The question has often been discussed in recent times, how far the general powers of sale and exchange, which are usual in settlements, are good, and their validity has been doubted(b). I cannot say that I entertain any doubt upon the point. I think that they are perfectly good, although not in terms confined within the rule against perpetuities, and upon this principle, that such powers may be barred by the owner of the preceding estate tail; and if once an estate in fee has been acquired by any one claiming under the limitations of the instrument, by which the power was created, it naturally ceases.

(a) 2 Bro. C. C. 215.

138 (n.); *Boyce v. Hanning*, 2(b) *Ware v. Polhill*, 11 Ves. 257;

Crompt. & J. 334; 2 Tyrw. 327;

Biddle v. Perkins, 4 Sim. 135;

Treatise of Powers, vol. ii. p. 494;

Earl of Powis v. Capron, 4 Sim.

Cruise, Dig. vol. iv. p. 187.

The present limitation, then, is a good contingent remainder; and I have now to consider whether in its terms it created valid cross-remainders. It has been insisted that *Doe v. Wainwright*(a) is not an authority to rule this case, and that it has not been acted on with respect to deeds: but I cannot agree with this position, for I have always thought that the Judges in that case only applied to deeds that sound and sensible construction, which had previously been confined to wills. I am not now speaking of implied cross-remainders, but I am speaking of the word "survivors" being construed to have the same effect as "others," in favour of the intention. The settlor plainly intended that upon failure of the issue of one daughter, the property should go to the other daughters and their issue: it may happen that the exact description is not answered by the event, but there is no magic in the words, and the intention is perfectly evident.

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Taking the whole together, the settlor was looking to the event on which the estate was to go over; but he certainly did not mean, that the circumstance of one of his daughters being actually alive at the time of the death of another without issue should be the event, upon which was to depend the taking effect of the limitation, in words, to the survivor and her issue. In this construction I am not laying down the law for the first time. I merely follow the rule of law, as laid down in the case of *Doe v. Wainwright* by much higher authority, and I follow it readily, because I consider it a sound and sensible rule of construction, and because, in this case, it enables me to give effect to

(a) 5 Term R. 427.

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the plain intention of the party, without doing the least violence to the language he has used. I hold, therefore, that these cross-remainders were well created; and if that be so, the opinion of the Court of Common Pleas is correct as regards the first point, only altering the certificate where an expression is incorrect(a).

The Judges are also right, I apprehend, upon the second point. Lady *Elizabeth* had not the whole third of her mother's share, at the time of the execution of the deed of 1779, because Lady *Matilda* was then living; but being entitled to a vested remainder in one-fourth part of her mother's share, and to contingent estates tail in one-fourth part of the third shares of her mother's sisters, she settled all her shares, and levied fines. It is said, in the first place, that these only included vested shares, and the word "vested" is relied on. I think it clear, however, that there is nothing in the deed to confine its operation to vested shares. "Vested" here means transmissible. She intended, by this deed, to convey all the interest she had in the property, whether vested or contingent, and the purposes of the settlement shew that such was her intention. She conveyed the whole estate, not merely her undivided share of it, and levied a fine, the effect of which is, that the entire estate is ransacked and operated upon by the fine. There is nothing upon the face of the deed, shewing an intention to confine its operation; and there are words even more general, than the description which I have referred to, carrying the case beyond a vested estate. I am not now alluding to the usual words, "all the estate, right, title, &c.;" but in a subsequent part of the deed, speaking of the fine,

(a) See *ante*, p. 15, n.

the words are, "as to, for, and concerning the parts, shares, and proportions, rights, titles, estates and interests of her, the said Lady *Elizabeth Sewell*, in remainder or reversion, expectant and to take effect in possession as aforesaid, of and in the said several hereditaments and premises hereinbefore particularly mentioned, &c." ; and I am clear that the words pass all the interests so vested in her, and that she could transfer them. The parties were dealing with what would come from the aunts, for the clause at the end of the deed, referring to the case of the total failure of issue of Lady *Elizabeth*, before the deaths of all the persons there named, shews they were dealing with the interests, which she would have after that period. Upon this point, also, I am of opinion, that the Court of Common Pleas has come to a right conclusion.

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Supposing then the deed of 1779 to have passed all the interest, that was at that time capable of being transmitted by Lady *Elizabeth*, there was still that share, which vested in Lady *Matilda*, who afterwards died. Now, a suit for a partition was instituted in the Court of Chancery ; and, in 1809, a decree was made, and there was a reference to the Master to inquire into the particulars of the estate, and he reported, that Lady *Elizabeth* was entitled to one-third of the whole estate, and she is treated as entitled to one-third, as in fact she then was, for Lady *Matilda* had previously died. The partition was accordingly carried into effect under the decree of the Court. The proper deeds were executed, and fines were duly levied ; and uses were declared of the portion, to which Lady *Elizabeth* was entitled, and no difference was made as to the particular interest taken in Lady *Matilda's* share. This is all, however,

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unimportant beyond the expression of intention, which may be collected.

Then comes the deed of 1825. If I hold that the entire estate was comprised in the term of 1000 years, I must decide with the Court of Common Pleas, that the deed of 1825 conveyed and limited to the trustees the portion, which belonged to Lady *Matilda*. This, I confess, is a question of great ambiguity and difficulty; the deed is of this nature. By some accident, three denominations of the estate were not included in the deed of 1779, and, therefore, not comprised in the term of 1000 years; Lady *Elizabeth* might have kept these denominations out of the term of 1000 years; but, without any necessity for doing so, she joined in the deed of 1825. (I had nearly omitted to mention a very material circumstance. The trustees of the term had filed a bill for the purpose of raising the charge; there had been a reference to the Master, and he reported that Lady *Elizabeth* was entitled to one-third, and which was comprised in the term; and that report, without exception, was confirmed, and a decree made for a sale of all the lands. This was previously to the deed of 1825). Lady *Elizabeth* was not bound to suffer a recovery; but *ex abundanti cautela* she did suffer a recovery of the estate, and she limited so much of the estates, as were comprised in the deed of 1779, to the uses of that deed; but Lady *Matilda's* share was not included in the deed of 1779. She declared, that as to the three denominations, the recovery should enure to the use of the trustees of the term of 1000 years, so that she voluntarily placed these denominations under the restraint of that term; and then she declared in a singular manner, that the estates comprised in the deed of 1779, of which the uses are declared, should,

subject to the trusts of that deed, stand settled to such uses as she should by deed or will appoint, notwithstanding her coverture. This is a mere question of intention; it admits of little doubt, for when Lady *Elizabeth* conveyed the three denominations, and placed them, in effect, in the deed of 1779, was she likely to keep back the one-thirty-sixth share? It is plain that, subject to the uses of the deed of 1779, she intended to reserve a power of disposition in herself, notwithstanding her coverture, over so much of the estate as should be left, after the purposes of the deed of 1779 were satisfied. As there is no other limitation of this share, her intention would be defeated, unless I hold it to be comprised in the deed. Can I then effectuate her intention? I cannot conceal from myself, that it is very difficult to do this, but the Court of Common Pleas has certified in favour of that construction, and I think I may get over the difficulty in this way. The decree in the partition suit stated that the whole estate was included in the term. Lady *Elizabeth* was acting on her title, as stated in the decree. Recollect that this deed comprises in terms the entire estate, including this one-thirty-sixth share. When she limits the estates, describing them as bound by the deed of 1779, I must, in order to give effect to her intention, hold that she was speaking of that deed, as it had been understood in the decree. Her power rode over the whole estate, subject to the 1000 years' term, and she treats that deed of 1779 as comprising the estate.

In this way, by a very liberal construction, I can effectuate her intention. I admit it is open to very considerable difficulty, but I do not feel sufficient confidence in any other view that has been suggested to my mind to justify me in differing from the Court of Common Pleas, or in sending

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the case for the opinion of another Court of Law. I shall, therefore, confirm the certificate, in all respects, after it has been corrected in the matter of form, and, accordingly, dismiss the bill; but as the case is one of very considerable difficulty, without costs.

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April 26, 29.

By a deed of settlement, executed on the occasion of the marriage of *B.*, certain lands, of which *A.*, the father of *B.*, was seised, as tenant for life, were conveyed to trustees, in trust to pay *B.* an annuity during the life of *A.*; and certain other lands, to which *A.* was absolutely entitled, were also conveyed, upon trust to permit *A.*, and his heirs and assigns, to

receive the rents and profits thereof during *B.* (the son's) life, and subject thereto, to secure a jointure of 300*l.* for the son's intended wife, and to raise a sum of 4000*l.* as portions for the younger children of the marriage; and it was provided, that these portions should be divided among the younger children, in such shares and proportions as *B.* should appoint, and in default of appointment, share and share alike, and should be payable to such of them as should be sons, at their ages of twenty-one years, and to such of them as should be daughters, at their ages of twenty-one years, or days of marriage, which should first happen, "if such respective times of payment should happen after the death of *B.*, but if before, then within three calendar months after the death of the said *B.*, and not before, or sooner, unless with the consent of the said *A.*, if living, and if dead, of the said *B.*, testified in writing under their respective hands and seals."

B., after the death of his father, *A.*, in pursuance of the power contained in this settlement, executed an appointment in favour of the Plaintiff, who was one of his younger children, and who had attained her age of twenty-one years, and directed such portion to be raised and paid to her forthwith.

Upon a bill filed to raise the amount thereof:—*Held*, that the settlement authorized *B.*, the son, after the death of his father, to charge the lands with the portion in question, and to direct its immediate payment.

the younger, in tail male; with power to the said *John Keily*, the younger, to charge the said lands with a jointure not exceeding 200*l.* for any woman he should marry, and with a sum not exceeding 2000*l.*, for the portions of any younger children he should have; and that it had been agreed by *John Keily*, the elder, to charge this Dungarvan estate with an annuity of 900*l.* per annum, to be paid to the said *John Keily*, the younger, during the life of *John Keily*, the elder, and to his eldest or only son, in case of the death of the said *John Keily*, the younger, during the life of his father.

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The settlement then recited, that it was also agreed to charge certain other lands, called the lands of Tercullenbeg, of which *John Keily*, the elder, was the absolute owner, with an annuity of 300*l.*, as part of the jointure agreed to be provided for the said *Margaret Bagwell*, in case she should survive her intended husband; and also with a sum of 4000*l.*, as part of the portions intended to be provided for the younger children of the said intended marriage; and after further reciting that *John Keily*, the elder, and *John Keily*, the younger, had agreed to charge certain other lands, called the lands of Strongeally (which were held under a lease of lives, with a covenant for perpetual renewal, and were limited to *John Keily*, the elder, for life, with remainder to *John Keily*, the younger, *quasi* in tail), with another annuity of 200*l.*, in order to make up the yearly sum of 500*l.*, being the full jointure intended to be provided for the said *Margaret Bagwell*, in case of her surviving the said *John Keily*, the younger, and also with a sum of 2000*l.*, in order to make up the sum of 6000*l.*, being the full amount of the portions agreed to be provided for the younger children of the said intended marriage, the said indenture wit-

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nessed, that the said *John Keily*, the elder, conveyed the Dungarvan estate to *W. Bagwell* and *John Keane*, and their heirs, during his life, upon trust to pay, during the life of the said *John Keily*, the elder, an annuity of 900*l.* per annum, to *John Keily*, the younger, and to his eldest son, in case he should die during his father's life, leaving an eldest son, with the usual powers of distress and entry.

The lands of Tercullenbeg were conveyed to the same trustees, to hold to them, their heirs and assigns, for and during the lives of the several *cestui que vies*, for whose lives the said lands were held, and for and during the lives of such other persons as should, from time to time, be added thereto, in pursuance of the covenant for perpetual renewal in the original lease thereof contained, "upon trust, to permit and suffer the said *John Keily*, the elder, and his heirs and assigns, to take and receive the rents, issues, and profits thereof, until the death of the said *John Keily*, the younger;" and then, in case the said *Margaret Bagwell* shall survive the said *John Keily*, the younger, notwithstanding the said *John Keily*, the elder, may be then living, "upon trust to permit and suffer the said *Margaret Bagwell*, and her assigns, during her natural life, to have, receive, and take, by, with, and out of the rents, issues, and profits thereof, an annuity, or yearly rent, or sum of 300*l.*, as and for so much of her said jointure of 500*l.*," &c., with the usual powers of distress and entry for securing the same; "and to this further intent and purpose, that in case there shall be an eldest or only son, and one or more other child or children of the said *John Keily*, the younger, on the body of the said *Margaret Bagwell*, his intended wife, to be begotten, or in case there shall be no son or sons, or issue male of the said *John Keily*, the younger, on

the body of the said *Margaret Bagwell*, his intended wife, to be begotten, or being such son or sons, or issue male, and all of them shall happen to die without issue male of his or their body or bodies, and there shall be one or more daughter or daughters of him, the said *John Keily*, the younger, on the body of the said *Margaret Bagwell* begotten, living at the time of such failure of issue male as aforesaid, or at any time after, then, and in any of such cases, upon trust that they the said *William Bagwell* and *John Keane*, or the survivor of them, &c., shall and do, by demise, sale, or mortgage of said towns, lands, hereditaments, and premises hereby last granted and released to the said *William Bagwell* and *John Keane*, or a competent part thereof (but without prejudice to the said annuity, yearly rent, or sum of 300*l.*), raise, levy, or borrow, and take up at interest the sum of 4000*l.*, as part of the portion or portions of such younger child or younger children, daughter or daughters, as the case may be; the said sum of 4000*l.*; to be paid in manner following, that is to say, if there be but one such younger child, or one such daughter, then the said sum of 4000*l.* to be paid as follows: if a son, at his age of twenty-one years, and if a daughter, at her age of twenty-one years, or day of marriage, whichever shall first happen; and if two or more such younger children or daughters, then the said sum of 4000*l.* to be shared and divided between and amongst such younger children or daughters, as the case may be, in such parts and proportions, as the said *John Keily*, the younger, shall, at any time or times during his life, by any writing or writings under his hand and seal, attested by two or more witnesses, or by his last will and testament, to be by him signed, sealed, and published, in the presence of three or more witnesses, direct, limit, or appoint; and in default of such

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direction, limitation, or appointment, then the said sum of 4000*l.* to be equally divided amongst such younger children or daughters, as the case may be, share and share alike; the said portions of such younger children or daughters to be paid in manner following, that is to say, to such of them as shall be a son or sons, at his or their respective ages of twenty-one years, and to such of them as shall be a daughter or daughters, at her or their respective ages of twenty-one years, or days of marriage, which shall first happen, if such respective times of payment happen after the death of the said *John Keily*, the younger; but if before, then, within three calendar months after the death of the said *John Keily*, the younger, and not before, or sooner, unless with the consent of the said *John Keily*, the elder, if living, and if dead, of the said *John Keily*, the younger, testified in writing under their respective hands and seals; and upon this further trust, that in the meantime, and until the said portions shall become payable as aforesaid, the said *William Bagwell* and *John Keane*, and the survivor of them, &c., shall and do, by and out of the rents, issues, and profits of the said last-mentioned towns, lands, hereditaments, and premises (but without prejudice to the said annuity, yearly rent, or sum of 300*l.*), raise and levy such competent yearly sum or sums of money, for the maintenance and education of such younger child or children, daughter or daughters, as shall not exceed, in the whole, the interest of their respective shares or proportions of said sum of 4000*l.*, after the rate of 5*l.* in the hundred yearly."

The settlement then witnessed, that *John Keily*, the elder, and *John Keily*, the younger, conveyed the lands of Strongeally unto the said *William Bagwell* and *John Keane*, their heirs and assigns, for and during the lives of the seve-

ral *cestui que vies*, for whose lives the said lands were then held, and for and during the lives of, &c., upon trust to permit the said *John Keily*, the elder, and *John Keily*, the younger, according to their respective estates therein, to take and receive the rents, issues, and profits thereof, until the death of the said *John Keily*, the younger; and then, in case the said *Margaret Bagwell* should survive the said *John Keily*, the younger, upon trust to permit her to receive one further annuity or yearly rent, or sum of 200*l.*, in order to make up to her a jointure of 500*l.* by the year, with powers of distress and entry, as before; and subject thereto, to raise the further sum of 2000*l.* for the younger children of the marriage, in order to make up the sum of 6000*l.*, as the portion or portions of such younger children: this latter trust was expressed in precisely the same terms as were used respecting the 4000*l.*, which was charged upon the lands of Tercullenbeg.

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The settlement contained a declaration, that the rents and profits, which should remain unsold or undisposed of for the purposes for which the same were granted, should go to, and be received by the person, who would have been entitled to the same, if the settlement had never been made. Then followed a proviso, that in case the said *John Keily*, the younger, should charge the Dungarvan estate (when he should be in the actual possession thereof), with a jointure of 200*l.* for the said *Margaret Bagwell*, and also with a sum of 2000*l.* for the younger children, that then, and in such case, the corresponding charges thereinbefore made upon the lands of Strongeally should determine and cease.

The marriage was shortly afterwards solemnized, and there was issue thereof three sons, *John*, *Richard*, and

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William (of whom *Richard* died abroad, in or about the year 1836, intestate, and without issue), and one daughter, *Mary Keily*, the Plaintiff in the cause.

John Keily, the elder, died in 1808, having previously, by his will, which bore date the 9th of December, 1805, devised the lands of Tercullenbeg to trustees, for the use of his second son, *Arthur Keily* (the Defendant), for life, with remainder to the use of his first and other sons in tail, and appointed the said *Arthur Keily* his executor.

In 1839, the Plaintiff, *Mary Keily*, and her brother *William*, having attained their ages of twenty-one years, their father, *John Keily*, the younger, by deed of the 23rd of December, 1839, appointed the sum of 3692*l.*, part of the sum of 4000*l.*, late currency, charged upon the lands of Tercullenbeg by the settlement of 1800, in the following proportions, that is to say, 2*l.* to the said *William Keily*, and the residue, 3690*l.*, to the Plaintiff, *Mary Keily*, and he directed that same should be paid immediately, and that until paid, the charge should bear interest at six per cent.

A question having been raised on the part of *Arthur Keily*, the devisee of the lands of Tercullenbeg, whether, upon the true construction of the settlement of the 25th of August, 1800, the portions thereby provided for younger children, could be raised during the life-time of the father, *John Keily*, the younger, the present bill was filed by the Plaintiff, *Mary Keily*, and the only question in the cause was, whether that settlement authorized the raising of such charge during the life-time of her father, *John Keily*, the younger.

Mr. Serjeant *Keatinge*, Mr. *Monahan*, and Mr. *J. J. Hardey*, for the Plaintiff.

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A question like the present must always depend upon the particular penning of the trust, and the intention of the instrument. Such is the rule laid down by Lord *Eldon*, in *Codrington v. Lord Foley*(a). If there be a limitation to the parent for life, with a term to raise portions at the age of twenty-one, or marriage, and the interests have vested, and the contingencies have happened, *prima facie* the intention is, that the portions are to be raised; and this intention will neither be controlled by the circumstance, that the term for securing the portions is reversionary, *Smyth v. Foley*(b), nor by the fact, that the settlement contains a clause providing for the maintenance and education of the children so entitled to the portions; *Smyth v. Foley*; *Cotton v. Cotton*(c). The settlement in the present case ascertains the period, at which the portions shall be payable, namely, the age of twenty-one years, or day of marriage, provided such respective times should happen after the death of *John Keily*, the younger, but not before, unless with the consent of *John Keily*, the elder, if living, and if dead, with the consent of *John Keily*, the younger; thus giving to the grandfather, during his life, and after his death, to the father, a power to accelerate the time of payment, if they should think fit to exercise it. It cannot be disputed, that the portions might have been raised at any time during the life-time of the father, with the consent of *John Keily*, the elder, alone; and unless the Court is prepared to expunge from the instrument the latter words, "if dead," that is, if *John Keily*, the elder, be dead, "with the

(a) 6 Ves. 364.

(c) 3 Younge & C. 149 (n.)

(b) 3 Younge & C. 142; see *Michell v. Michell*, 4 Beav. 550.

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consent of the said *John Keily*, the younger," it must hold, that a similar power devolved upon *John Keily*, the younger, after the death of his father. The plain and obvious meaning of the settlement is, that upon the death of *John Keily*, the elder, that consent, which during his life was required to accelerate the raising of the portions, is transferred to the son, and his consent is substituted for that of his father, and becomes tantamount thereto; otherwise, the words must be construed to imply the absurd consequence of requiring the consent of *John Keily*, the younger, after his decease. It will be said, that it is unreasonable to intend that the son should ever have had the power of accelerating a charge upon his father's estate; but the Court cannot act upon such a principle. The intention of the parties is to be ascertained from the construction of the instrument itself; as Mr. Baron *Alderson* said, in *Smyth v. Foley*, "how is it possible for a Judge to know, except from the instrument, the intention of the parties? How can he know, whether his notions of expediency are the same as those of the party, on whose expressed intentions he is to decide?" In the instrument now before the Court, are to be found words expressly giving to the father that power, which, it is submitted on the part of the Plaintiff, both does, and ought to exist; and which words will not have any operation, unless the Court shall adopt the construction, which is contended for on the part of the Plaintiff.

Mr. Serjeant *Warren*, Mr. *Moore*, Mr. *Brooke*, and Mr. *Haughton*, for the Defendant, *Arthur Keily*.

The question for the Court to determine is, whether it was, or could ever have been the intention of the parties to this settlement, to give to the son a power of charging his father's estate, during his own life-time, with portions for his

2 younger children. Such an arrangement would, to say the
 7 least of it, appear to be a very improvident one, and more
 ■ particularly so where, from the settlement, it appears, that a
 ■ very ample provision was made by the father for the son, du-
 : ring his life. But, besides this, the legal estate in these lands
 of Tercullenbeg was vested in "*John Keily*, the elder, his
 heirs and assigns," during the son's life; *Broughton v.*
Langley(a), *Right v. Smith(b)*; he had the absolute and
 uncontrolled dominion over these lands during the life of
John Keily, the younger, and the term upon which these
 portions were charged was only reversionary. This, no
 doubt, is not sufficient to sustain the Defendant's case; it is
 a circumstance, however, strongly indicative of the intention
 of the parties. But, still further, the lands are conveyed
 to trustees to permit *John Keily*, the elder, his heirs and
 assigns, to take the rents and profits until the death of *John*
Keily, the younger; and then, that is, upon the death of
John, the younger, to provide a jointure for the intended
 wife; and to the further intent and purpose, to raise, &c.
 Now, where is there any thing in the subsequent part of
 the deed, to displace this express appropriation of the entire
 beneficial interest thus given to the father? The Court
 ought to require a very explicit declaration of the intention
 to abridge such a right; however, not only is there no such
 declaration to be found, but so far from there being any
 such intention expressed in the deed, all the subsequent
 trusts, comprehending that for the younger children's por-
 tions, are introduced with the words, "to the further in-
 tent," or "upon further trust," plainly referring to that
 portion of the beneficial interest in the lands, of which no
 previous trust had been declared, that is, the rents and

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(a) 2 Ld. Raym. 873.

(b) 12 East, 455.

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profits, after the decease of *John Keily*, the younger. If the clause had ended with the words, "within three calendar months after the death of the said *John Keily*, the younger," there would have been no doubt that the portions could not have been raised during his life-time. Where¹ then, is there to be found such a power as that which is now contended for? It is true, that no precise form of words is necessary to create such a power; a recital or preamble in a deed; an exception out of a prohibition, as, for example, a declaration that the estate of a tenant for life shall determine, if he alienate, for the purpose of preventing the estate going according to the limitation, otherwise than in the particular manner specified, may operate as a good reservation of a power; *Reade and Nashe's Case*(a); in fact, any words, however informal, are sufficient, provided they clearly manifest the intent to give such power. But how is it possible for the Court to ascribe such a magical force to a mere negative clause, such as that relied upon in the present case, which is so inconsistent with the previous trusts, and at variance with the general scope of the settlement, the intention of which appears plainly to be to postpone the payment of the portions in all events, until after the death of *John Keily*, the younger. How then is the clause in question to be explained? It seems to contemplate the contingency of the period of the younger children attaining the age of twenty-one years, or marrying, occurring after the death of *John Keily*, the younger; and in that event it provides that the portions shall not be raised until such respective periods, unless *John Keily*, the elder, if living, or *John Keily*, the younger, if his father shall have previously died, should otherwise direct. In this way all

(a) 1 Leo. 147.

parts of the instrument are reconciled ; and the apparent absurdity, which has been so much pressed in argument, of a party being required to consent after his decease, is completely removed : for the father, *John Keily*, the younger, might reasonably consent, during his life, that the portions of his younger children shall be paid after his decease, without waiting for the arrival of their full age or day of marriage. The construction, which the Defendant thus contends for, appears to be fortified by the frame of the clause for maintenance, “and upon further trust, that in the meantime, and until such portions shall become payable as aforesaid.” To what period do the words “in the meantime” refer ? Evidently to the period between the death of *John Keily*, the younger, and the time of payment of the portions. If the view submitted on the part of the Plaintiff be the true one, it follows that *John Keily*, the younger, might have executed an appointment in favour of a younger child, immediately upon its birth, and claimed maintenance to the full extent of the interest of the 4000*l*. The Court will struggle against such an inference as this, which yet appears to flow inevitably from the construction contended for.

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Mr. *Monahan*, in reply.

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I dare say that there is a great deal more in this case than I can at present see, as it has been so strongly pressed in argument at the bar by the counsel for the Defendant. I do not, therefore, mean now to dispose of the case finally, but I will state what my present impression is.

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I do not understand it to be disputed, that the portions are to be raised out of the estate in possession or in reversion, supposing the time for raising them to have arrived ; but it is insisted that I must construe the words, which relate to the accelerating the raising of the portions, as altogether inoperative, or as confined to the payment of the portions.

The property was thus circumstanced. There were three estates ; one of them, which was called the Tercullenbeg estate, was the absolute property of the father, *John Keily*, the elder ; another, the lands of Strongeally, was limited to the father for life, with remainder *quasi* in tail to his son, *John Keily*, the younger ; and the third, the Dungarvan estate, was devised, by an old will, to the father for life, with remainder to the son for life, with remainder to his first and other sons in tail male. By the settlement in question the father settled an annuity of 900*l.* upon his son during his own life, charged upon this Dungarvan estate, in which he had but a life interest, thereby making a provision for the son during the joint lives of himself and his father. It is said that I should look at the settlement to ascertain the amount, which was settled by the father upon the son, and consider its adequacy, in relation to the fortune he was receiving with his wife. But I disclaim any such power. I must give to the instrument a reasonable construction, according to the surrounding circumstances and the language, which the parties have adopted ; but I am not at liberty to consider whether the father gave too much or too little for the fortune of the young lady, or, what is of much more value in the view of the law, for the young lady herself. That was a matter entirely for the consideration of the parties themselves at the time. They were at liberty to

11 make just such terms as they thought proper, and I have
 21 nothing whatever to do with them.

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■ After having provided the annuity of 900*l.* per annum for
 ■ his son, the father charges the Tercullenbeg estate, to which
 3 he was absolutely entitled, with a jointure of 300*l.* for the
 intended wife, and 4000*l.* as portions for the younger child-
 ren of the marriage, and he conveys the property to trus-
 ■ tees upon trust for himself and his heirs, during the life of
 : his son, so as to keep it subject to his own disposition, in
 case of his death during his son's life-time. It was not ne-
 cessary that he should make any provision out of that es-
 tate for his son; he had already provided the annuity for
 him out of the other estate. This estate in the father and
 his heirs was subject, however, to the jointure of 300*l.* to the
 lady, in case she survived her husband. This is not said so,
 to be sure, in express terms, but it follows from the very
 next trust; for in the event of her surviving her husband,
 "and notwithstanding that *John Keily*, the elder, should
 be then living," the lady was to receive her jointure of 300*l.*
 per annum out of the estate of the father; so that it is
 clearly in derogation of the father's life interest, and to that
 extent the preceding limitation would be cut down.

Then comes the clause providing for the portions of the
 younger children, and it is, in this respect, framed in the
 ordinary manner. If the father were out of the way, there
 would be no difficulty, for the instrument provides expressly
 that the portions are to be paid to the younger children at
 twenty-one, if sons, and at twenty-one, or day of marriage,
 if daughters, provided those events should happen after the
 death of their father; but if, on the contrary, they should
 occur in his life-time, then the portions were not to be paid

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until after his death, unless with his consent. In the ordinary provisions of this description, the controversy generally is, whether the term for raising the portions is a reversionary term or not; whether, when the power has been exercised, the portions are raisable out of a reversionary term; or whether, on the contrary, the term does not precede and override the life estate, and, therefore, that in point of fact the portions are to be raised out of that life estate? If this settlement had been altogether in the ordinary form, that question would not have arisen, because the father here consents to the raising of the portions, and as he would, in an ordinary case, be the owner of the life estate, he could pay the portions out of it, if he chose. But this settlement assumed a different shape, because the son was not tenant for life; but the father reserved the estate to himself during the son's life, and after the decease of his son, he dedicated it for the purpose of raising the jointure for the son's widow, and the portions for the younger children. The proviso for raising the portions is in these terms: "and to this further intent and purpose, that in case there shall be an eldest or only son, and one or more other child or children of the said *John Keily*, the younger, on the body of the said *Margaret Bagwell*, his intended wife, to be begotten; or in case there shall be no son or sons, or issue male, of the said *John Keily*, the younger, on the body of the said *Margaret Bagwell*, his intended wife, to be begotten; or being such son or sons, or issue male, and all of them shall happen to die without issue male of their body or bodies, and there shall be one or more daughter or daughters," &c., then upon trust, to raise 4000*l.*, as part of the portion or portions of such younger child or younger children, and to be paid in manner following, "to such of them as shall be a son or sons, at his or their

i respective ages of twenty-one ; and to such of them as shall
 R be a daughter or daughters, at her or their respective ages
 2 of twenty-one years or days of marriage, which shall first
 e happen, if such respective times of payment happen after
 R the death of the said *John Keily*, the younger ; but if be-
 f fore, then within three calendar months after the death of
 e the said *John Keily*, the younger, and not before or sooner,
 i unless with the consent of the said *John Keily*, the elder, if
 e living, and if dead, of the said *John Keily*, the younger."—
 i Now to stop there. Is it possible for words to be more ex-
 plicit? The portions are to be raised after the death of
 i *John Keily*, the younger, and not sooner, without the con-
 sent of whom? First, of the grandfather, *John Keily*, the
 elder, because the estate was vested in him ; and after his
 death, with the consent of the father ; for though the estate
 was to go to the heirs of the grandfather, yet the settlement
 gave the father the power of directing, that the portions
 should be raised during his own life.

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It is said that this is merely a negative clause, and on my
 pressing the Defendant's counsel upon this point, I collect
 that I am not to give any effect to these words. I am not to
 strike the clause out, but I am to permit it to stand as inopera-
 tive, and having no definite meaning. But what is the rule of
 construction in such cases? Why, that though the clause is
 in form negative, yet it is pregnant with an affirmative, and
 expresses, as clearly as language can, that if the event hap-
 pens, namely, that if *John Keily*, the grandfather, in his
 life-time, or after his death, *John Keily*, the younger, con-
 sents, the portions are to be raisable. It is urged, that it
 was very unreasonable to give to the son a power to charge
 his father's estate ; but that was the bargain ; it was matter
 of agreement at the time, and was entirely for the considera-

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tion of the parties themselves, and if they chose to arrange it so, I am bound by it. It might be very imprudent for the father to settle an annuity of 900*l.* upon his son, during his own life; but he thought proper to do so. It might be very unreasonable for the father to charge a jointure for his son's widow, during his own life; but he did so. It might be very unreasonable for the father to charge his estate with portions for the younger children of his son; but that is the deed, which I have simply to execute: my duty is merely to construe the settlement as I find it, and I am of opinion that, both according to the plain meaning of the terms made use of, and the evident intention of the parties, the portions may be raised during the life-time of *John Keily*, the younger.

A second construction has been put forward by another of the Defendant's counsel; a construction, by which it is not necessary that the words in question should be rejected, but only confined. It is argued that the words relate to the period of payment of the portions, and not to the time of raising them: but I cannot concur in that construction. The clause is the common and ordinary one. The portions are to be paid upon the happening of certain events, supposing these events not to occur until after the death of the father. But should they happen in his life-time, the portions are not to be raised in his life-time, without the express consent of either the grandfather or father. I am not called on to determine whether the payment of the portions might be accelerated; but I think it clear, that either the grandfather or the father in succession might accelerate the raising of the portions. Supposing the true construction to be, as it is my impression that it is, that the portions could not be raised before the children

arrived at the age of twenty-one, then the consequence would not follow, which has been insisted on as so very absurd and unreasonable, that it gives to the father a power of charging his father's estate for an infant. If it were not so, and that they could be raised before the children came of age, that argument would, no doubt, be available. But is not that the case in every settlement, where it is not confined to majority? The settlement never specifies the age at which the appointment is to be made, and it is, therefore, possible, that a portion may be appointed to an infant. But that cannot be guarded against. You must trust something to the parties themselves; and who are the parties in the present case? why, the settlors themselves,—the father and son; and they have provided a check, by making a certain consent requisite. And in whom is that trust and confidence reposed? why in the very parties themselves. The grandfather reserves to himself the power of consenting to the raising of the portions during his own life, and he is not afraid to intrust his son with a similar power after his decease; he is not afraid that his son will charge the estate improperly after his death. But if even such an abuse should be attempted, a Court of Equity is not powerless to guard against it. *Lord Sandwich's Case*(a) decided this; there a father, who had a power of appointment among his children, supposing that one of them was in a consumption, executed his power in favour of that child, and the Court declared the appointment to be void, being of opinion that the object of the appointor, when he made the appointment, was that he might himself have the chance of getting the share, as administrator of his child. I apprehend, therefore, that if a father, with such a power,

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(a) Mentioned in *M^cQueen v. Farquhar*, 11 Ves. 467, 479.

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charges a portion for his child, not because the child wants it, but because the child is delicate in health, and likely to die, this Court has authority to defeat such an act. There can be no doubt that this Court has full power to restrain any undue, I mean any fraudulent, execution of the power. In the present case there is no pretence or suggestion of anything like fraud. The question raised is merely one of construction.

Besides the above objections, which have been urged by the Defendant's counsel, there is a difficulty of this nature suggested. Look at the settlement of the third estate, the lands of Strongeally, and when construing the clause relative to the portions, bear that in mind, and see how absurd it is to say, that the portions are to be raised during the lifetime of the father, *John Keily* the younger. Now the alleged absurdity is this, that words used in charging the additional portions of 2000*l.* on that estate are the same as those used in the previous part of the settlement in charging them on the Tercullenbeg estate, which belonged to the father. The provision is as follows : after conveying the lands to trustees upon trust, in case there should be several younger children of the marriage, to raise a further sum of 2000*l.*, in order to make up the said sum of 6000*l.* for such younger children; there is then a power of appointment given to the father, *John Keily*, the younger; and in default of appointment then come these words : "the said sum of 2000*l.* to be divided equally amongst such younger children or daughters, as the case may be, share and share alike, the said portions of such younger children or daughters to be paid in manner following, that is to say, to such of them as shall be a son or sons, at his or their respective ages of twenty-one years, and to such of them as shall be a

daughter or daughters, at her or their respective ages of twenty-one years, or days of marriage, which shall first happen, if such respective times of payment happen after the death of the said *John Keily*, the younger ; but if before, then within three calendar months after the death of the said *John Keily*, the younger, and not before or sooner, unless with the consent of the said *John Keily*, the elder, if living, or if dead, of the said *John Keily*, the younger." Now it is urged that it is absurd to say that the grandfather was to have the power of consenting to the raising of the portions out of the father's estate. But I see no absurdity in it. The grandfather had already made a like provision as to his own estate ; he was not unwilling to charge his own estate with portions for the younger children of his son ; and he did not think it unreasonable to give to his son a power of raising those portions out of that estate during his life. Could the son refuse to give to his father a similar power, when they came to deal with his estate ? Where is the difficulty ? Must not the grandfather, if he consents to the portions being raised during his own life, charge his own life estate with them, before he can charge his son's remainder ? Why am I to contemplate any abuse of these powers, when no such abuse has been even suggested ? If the parties distrusted each other, and desired to have particular guards against abuse, why did they not express it, and thus prevent the portions being raised, except in the particular event, and under the particular restrictions, which they contemplated ? The settlement appears to me to be an exceedingly rational one, and my clear opinion is, that the time has come, and that the portions are raisable : but out of deference to the counsel, who has expressed so strong an opinion upon the subject, and no one is more competent to form an opinion, or is entitled to more respect, I will not dispose of the case finally at present, and he may

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rest assured, that I will look carefully into the question, and give it every possible consideration.

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On this day the Lord Chancellor said, that he had considered the case with great attention, but that he had seen no reason to change the opinion he expressed on the former day. He should, therefore, declare that the power was well executed, and that the time for raising the portions had arrived, and that they were to be raised forthwith, with interest at five per cent., and that, under the peculiar circumstances of the case, the decree should be without costs on either side up to the hearing.

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*Feb. 24.**April 21, 27.*

A tenant in tail, by indenture of settlement, executed upon the occasion of the marriage of

LULLUM BATWELL being seised of an estate in tail male, in certain lands situated in the county of Cork, by indenture dated the 10th of February, 1809, and made

his eldest son, reciting that he was seised in fee or in tail, conveyed the lands, as if he was seised in fee, to trustees for a term of 100 years, to secure a jointure for the intended wife of his son, in case certain other lands, on which it was primarily charged, should be sold; and subject to said term, to the use of himself for life, remainder to trustees for a term of 200 years, to raise portions for his younger children, and subject thereto to the use of his son for life, remainder to trustees to preserve, &c., remainder, subject to a third term of 300 years, to the first and other sons of his son in tail. No fine, recovery, or disentailing deed was levied, suffered, or executed by the father or by the son. A bill was filed to raise the portions for the younger children of the father, the settlor, and a decree was pronounced, directing a sale of the term of 200 years.

After the decree, the eldest son of the marriage, his grandfather being then dead, executed a disentailing deed, and subsequently, his father having died in the interval, conveyed the lands in fee expressly subject to the term, to a stranger to the suit, by whom, shortly afterwards, the fee was conveyed to the widow of the father, who was a party to the suit, and against whom a decree upon sequestration had been obtained.

The term was sold, and the purchaser objected to the title; but the title was held good by the Master of the Rolls, and afterwards, upon appeal, by the Lord Chancellor.

Held, also, that the acts of the eldest son operated as a confirmation of the settlement.

Held, also, that the widow of the father having acquired her title after the decree, was bound out of that title to give effect to the decree.

Held, also, that certain judgments obtained against the eldest son of the marriage, pending suit, did not create any objection to the title.

between *Lullum Batwell* and *Elizabeth Batwell*, his wife of the first part; *Andrew Batwell*, the eldest son and heir apparent of the said *Lullum Batwell*, of the second part; *William Galway* and *Helen Katherine Galway*, spinster, of the third part; and several sets of trustees, of the fourth, fifth, sixth, and seventh parts, being the settlement executed previously to the intermarriage of *Andrew Batwell* and *Helen Katherine Galway*, reciting that *Lullum Batwell* was then seised in fee simple, or in fee tail, of the said lands, it was witnessed, that *Lullum Batwell* granted and released the said lands to the use of *Lullum Batwell* until the marriage, with remainder to the use of *James Cotter* and *John Boles Reeves*, for a term of 100 years, to secure a jointure of 150*l.* per annum for *Elizabeth Batwell*, and also to secure a jointure of equal amount to *Helen Katherine Galway*, in case she should survive her intended husband, and in case certain other lands situated in England, and upon which the latter jointure was charged in the first instance, should be sold, pursuant to the provisions for that purpose contained in the deed; and subject to the said term, to the use of *Lullum Batwell* for his life, remainder to trustees to preserve, &c.; remainder to trustees for a term of 200 years; remainder to the use of *Andrew Batwell* for his life; remainder to trustees to preserve, &c.; remainder to trustees for a term of 300 years; remainder to the first, second, and other sons of *Andrew Batwell*, successively, in tail male, with several remainders over, which, however, it is not necessary particularly to state; and the trusts of the term of 200 years were declared to be to raise, by sale or mortgage of the lands, the sum of 3000*l.*, for the portions of the younger children of *Lullum Batwell*, the settlor. The settlement contained the usual covenant for further assurance by *Lullum Batwell*.

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Neither *Lullum Batwell* nor *Andrew Batwell* ever at any time levied a fine, suffered a recovery, or executed a disentailing deed of the lands comprised in the settlement of 1809.

By indenture bearing date the 12th of September, 1811, being the settlement executed previously to the marriage of *Jane S. Batwell*, one of the younger children of *Lullum Batwell*, with *Edward Fitzgerald Massy* (to which deed *Lullum* and *Andrew Batwell* were parties), after reciting the settlement of 1809, it was witnessed, that *Lullum Batwell* thereby appointed 2750*l.*, part of the charge of 3000*l.* created by the deed of 1809, to the said *Jane S. Batwell*, and of this sum 750*l.* was subsequently assigned to, and became vested in, *Hugh Massy* and *Eyre Massy*, the Plaintiffs in this cause.

On the 25th of July, 1823, *Hugh* and *Eyre Massy* filed a bill in this court against *Lullum* and *Andrew Batwell*, the trustees of the deed of 1809, and other parties interested under that settlement, praying that the trusts of that deed might be carried into execution, so far as it provided for the payment of the 750*l.*, and that in default of payment the lands, upon which it was charged, might be sold for the term of 200 years.

Lullum Batwell died on the 1st of January, 1826, and in 1830 the Plaintiffs filed an amended bill and bill of revivor, and to this bill *Helen Katherine Batwell*, and *Thomas Batwell*, the eldest son of *Andrew*, who attained his age of twenty-one years in 1831, were made parties Defendants.

On the 22nd of April, 1837, the Plaintiffs obtained a

conditional decree on sequestration, against *Andrew, Helen Katherine, and Thomas Batwell* ; and on the 7th of June, 1838, that decree was made absolute, and the usual decree for an account was pronounced.

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Under this decree the Master made his report, on the 24th of May, 1839, and on the 14th of June following, a final decree was pronounced for the sale of the term of 200 years, and it was directed by that decree, that all proper parties should join in executing the deed of conveyance to the purchaser.

Thomas Batwell, on the 19th of June, 1839, executed a disentailing deed, pursuant to the provisions of the Statute 4 & 5 Will. IV. c. 92, but to that deed *Andrew Batwell* was not a party. *Andrew* died on the 14th of January, 1840, and on the 25th of July following, *Thomas Batwell* conveyed the lands comprised in the settlement of 1809, subject to the term of 200 years, to *Michael S. Russell*, his heirs and assigns ; and in April, 1842, *Michael Russell* conveyed all his interest to *Helen Katherine Batwell*. *Michael Russell*, on the 4th of February, 1841, signed a consent in the cause, by which he undertook to execute the deed of conveyance to the purchaser.

In November, 1841, the term of 200 years was sold under the decree. The purchaser investigated the title, and, upon making the usual searches, judgments unsatisfied upon record were discovered to have been obtained against *Thomas Batwell, Helen Katherine Batwell, and Michael Russell*. These judgments had all been entered since July, 1823, when the original bill was filed.

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The purchaser, under the circumstances above detailed, filed objections to the title upon the following grounds, viz. :—That *Lullum Batwell* was bare tenant in tail at the time of the execution of the settlement of 1809 ; that he never did any act to enlarge that estate tail, and that consequently there was not any legal term of 200 years which could be assigned ; that *Helen K. Batwell* had only been made a party in respect of her contingent right to jointure out of the lands, and that, therefore, her rights acquired under the conveyance from *Michael Russell* were not bound by the decree in the cause, and that consequently she could not be compelled to convey to the purchaser ; and lastly, that the judgments above mentioned constituted a defect in the title.

The objections were argued before the Master, who was of opinion that they were well founded, and, accordingly, reported against the title.

To this report the Plaintiff took exceptions ; and the case was argued, before the Master of the Rolls, by Mr. Serjeant *Warren*, and Mr. *Molesworth*, for the Plaintiffs, and Mr. *Moore* and Mr. *Collins*, for the purchaser, when His Honor allowed the exceptions, and pronounced the following judgment :

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This case has been argued with great ability on both sides, and as I shall not sit again until next Term, and the parties may desire to take the case to another tribunal in whatever way I may dispose of it, I do not think it worth while to delay my judgment, and shall, therefore, now put the parties in possession of the grounds of it.

The facts are shortly these: *Lullum Batwell*, in the year 1809, was seised of the lands in question, as all parties admit, of an estate in tail male; but professing to be seised in fee simple, upon the marriage of his eldest son, *Andrew Batwell*, he entered into a settlement, by indentures of lease and release. By this deed, to which *Andrew Batwell* was a party, after reciting that *Lullum Batwell* was seised in fee, the lands were conveyed to trustees, first to secure a jointure to the intended wife, then to the use of *Lullum Batwell* for life; with remainder to trustees for a term of 200 years; with remainder to the use of *Andrew Batwell* for life; with remainder to trustees for a term of 300 years; with remainder to the first and other sons of *Andrew* in tail male. The trusts of the term for 200 years were declared to be to secure 3000*l.* for the younger children of *Lullum Batwell*. The bill was filed to raise 750*l.*, a portion of this charge of 3000*l.* It is important to observe, that although *Lullum Batwell* had only an estate tail, yet the effect of the conveyance by lease and release was to create a base fee, which, while it continued, would serve all the estates limited by the deed. Mr. Serjeant *Williams'* note to *Took v. Glascock*(a) shews that the authority of that case cannot be sustained; he says, "This case is denied by Lord *Holt*, in *Machell v. Clarke*(b), where it is held, agreeable to what had been before determined in *Seymour's Case*(c), and to what is said by Lord *Hobart*, in *Sheffield v. Ratcliffe*(d), and in *Stone v. Newman*(e), that if tenant in tail, by bargain and sale, lease and release, covenant to stand seised, or any other innocent conveyance, as it is called, operating by way of grant, conveys to another and his

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(a) 1 Saund. 260 (n. 1).

(c) 10 Rep. 96, a.

(b) 2 Salk. 619; 2 Ld. Raym.

(d) Hobart, 334.

778.

(e) Cro. Car. 427.

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heirs, the grantee has a base fee simple, determinable on the death of tenant in tail, by the entry of the issue in tail and until it be so determined, such estate hath all the incidents of a fee simple." So in the case of *Hartnet v. Coughlan*(a), Chief Justice *Bushe* says, " It is now well settled that a tenant in tail, by grant of his estate, conveys a base fee, determinable upon the expiration of his estate tail : " and in that case it was decided, that a conveyance of this nature created a base fee, so as to cause a merger of an estate for life previously vested in the releasee.

The deed of 1809 was entered into both by father and son. This suit was instituted in 1823 ; in 1830, upon the death of *Lullum Batwell*, the father, an amended bill was filed, making *Andrew Batwell*, and his wife, and also *Thomas*, his eldest son, parties. The frame of the bill, and the decree, are very material in the view which I have taken of the case ; the bill charged the seisin in fee of *Lullum Batwell* ; the due execution of the deed of 1809 ; and it asked relief, by the carrying into execution the trusts of the term for 200 years, that is to say, by a sale of the term to raise the portions secured thereby. It was then clearly an adversary suit, instituted for the establishment of adverse rights, claimed by the Plaintiff, and sought to be enforced through the adverse title of the trustees of the term. *Andrew Batwell* was made a party, as being tenant for life under the deed of 1809 ; *Thomas*, as being the first tenant in tail under the same instrument. But the real state of the title was, that *Andrew* was tenant in tail under the old settlement ; and if the deed of 1809 was inoperative, his son, as mere issue in tail, had not any right cognizable in this Court ;

(a) 2 Fox & S. 368.

in fact, *Thomas* had no right, in respect of which he could have been made a party, except as remainder-man, under the limitations of the deed of 1809, and it was plainly his interest to maintain his character as a purchaser under that deed. That deed destroyed his father's power of barring his rights, by cutting off the old entail; and under its provisions *Thomas Batwell* could have created a base fee, which he might have made available for his own purposes, in his father's life-time, without his father's concurrence. This deed was his better, in fact, his only title. Thus circumstanced, *Thomas Batwell* allows the bill to be taken *pro confesso* against him; that is to say, he admits the statements of the bill as true, and, of course, admits the seisin in fee of *Lullum*, and the validity of the deed of 1809. On those admissions the decree was made, and *Thomas* is as much bound by that decree, as if these facts had been proved against him in the cause. The same proposition holds good against *Mrs. Batwell*, his mother; she had no interest in the subject-matter of the suit, except that, which she derived under the same deed, and was, consequently, effectually bound by the decree.

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This decree then barred and concluded every person, who was a party to the suit in which it was made; it bound all parties to carry it into effect in all its terms, and particularly in those directions, which related to the conveyance to the persons, who should become purchasers under it. It is scarcely necessary to observe, that there is not any difference between the decrees of this Court, whether they are thus made upon admissions, or upon proofs; all are of equal efficacy, as long as they continue unreversed; all are alike pleadable in bar of a new bill relating to the same matter, between the same parties. *Mr. Beames*,

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in his *Treatise on Pleas*(a), says, "As a decree of the Court of Equity is for most, if not all purposes, equal to judgment at law, and it is an invariable rule, that a decree enrolled can only be altered on a bill of review, a former decree, signed and enrolled, may be pleaded in bar to a new bill relative to the same matter, between the same parties for if the Court were to give a different judgment in the second suit, from that which it gave in the first, there would be two contradictory judgments appearing on the same record:" and there are several pages upon the subject to the same effect. A decree is, therefore, final and conclusive, as to all matters adjudicated upon. In *Trevivan v. Lawrence*(b), it was said, "If a *scire facias* be brought against the issue in tail, upon a judgment in debt against the ancestor, and he, being warned, makes default, he shall not come afterwards and say that he is tenant in tail." *Thomas Batwell*, therefore, cannot now set up his estate tail.

By the deed of 1809, the estate tail was converted into a base fee, a defeasible estate; but it is quite plain that *Andrew* never entered to defeat that estate; he claimed as tenant for life under the deed, and not as issue in tail against the deed. In 1834, during *Andrew's* life, a receiver was appointed upon the title of the trustees of this term, and that receiver remains in possession to this hour; there can, therefore, have been no entry by *Thomas Batwell* to defeat this base fee.

The decree of 1839 being then binding on all parties in the cause, binding them, in substance, to join in making a

(a) Page 205.

(b) 1 Salk. 276.

good title to the contemplated purchaser, and equally binding all persons deriving under them, what is the first act of *Thomas Batwell*? In 1839 he executes a disentailing deed pursuant to the late Statute^(a). Now this, although a voluntary act, was calculated to work out the decree, for it was the very step necessary to be taken, in order to make out title to a purchaser; and I must presume that it was taken in order to effectuate, and not to defeat, the objects of the decree. His next step, the conveyance to *Russell*, must be viewed in the same light; *Thomas Batwell* did not seek thereby to defeat the decree, he did not profess to defeat the trusts of the term of 200 years, on the contrary, he expressly binds *Russell*, as he was himself bound, for he makes the conveyance to him expressly subject to the trusts of the term. *Russell* executes a similar conveyance to Mrs. *Batwell*, who would thus appear to have incurred an additional obligation to effectuate the decree. What then would be the use of filing a supplemental bill against her? What imaginable defence could she make, or to what obligation could it subject her, to which she was not already liable? Could she say *Thomas Batwell* or *Russell* was not bound? It is plain she could not, and equally so, that she could not deny that she herself was bound, or that this shifting of the estate after the decree could prevent the Court from acting against a party in the cause, who had acquired it, and was under the obligations I have mentioned. I can hardly imagine what should be the frame of such a bill. I have, therefore, no doubt but the Court will compel this lady to effectuate the decree.

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The next question for my consideration relates to the

(a) 4 & 5 Will. IV. c. 92.

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doctrine of *lis pendens*, and in this the judgment creditors of *Thomas Batwell* are interested. It is quite clear, that no equitable estate acquired *pendente lite* can be urged by a purchaser as an objection to the title. I admit that the rights of parties, as they exist when the bill is filed, are to be considered; but this suggests no valid ground of objection, for none of these judgment creditors had then any rights; all their judgments were recovered *pendente lite*.

The purchaser who buys *pendente lite*, purchases what is then the subject of litigation, and the policy of this Court avoids the clogs, which would impede the progress of the suit, if it were necessary to make such purchasers new parties. The purchaser *pendente lite* takes his purchase knowing that he cannot intervene in the cause, either to protect or assert his own or the rights of those, under whom he derives; he buys, and knows he does so, subject to the condition and liability of being bound by the decree, which the Court is to pronounce either on the proofs or admissions in the cause; he, therefore, to a great extent, puts himself in the power and at the mercy of the parties, with whom he deals, and with whom alone the Court has to deal, in deciding upon the matters in litigation, and cannot complain, if, under such circumstances, the rights, on which his are dependent, are either not duly asserted or defended, or that the Court acts of necessity on the facts, either confessed or proved. This I collect to be the result of the doctrine in *Metcalf v. Pulvertoft*(a). In that case, Sir Thomas Plumer says, "The true interpretation of the rule is, that the conveyance does not vary the rights of the parties in that suit; that it gives no better right, having

(a) 2 Ves. & B. 200.

effect with reference to any beneficial result against the Plaintiff in that suit, and it is very reasonable, that the litigating parties should be exempted from the necessity of taking notice of a title acquired under such circumstances. With regard to them, it is as if it had never existed ; otherwise suits would be indeterminable." The Court, therefore, must act as if the original parties continued in the same relation to each, in respect to the title to the estate, and the matters in litigation ; and if the purchaser's rights are prejudiced, it is the consequence of his having bought subject to the condition I before mentioned. Here the Plaintiffs have alleged the deed of 1809, and that *Andrew* was tenant for life, and *Thomas* tenant in tail ; and if these parties, by a subsequent consent or confession, have betrayed their creditors, the creditors can only complain of those who have abandoned them, and not of the Plaintiffs, or of the decree, which they have fairly and duly obtained. They had no right to embarrass the proceedings in the cause, by asking to be made parties, and they have no right in any way to thwart the execution of the decree. The Vice-Chancellor proceeds to say, " The authorities establish this proposition, that alienation pending a suit gives no new right, and does not vary the rights of the litigating parties ; the alienation of the Defendant for the purpose of that cause has no effect as against the Plaintiff, who is entitled to proceed, as if no such title existed ; and it would be extraordinary, that in another suit, with other parties, for other purposes, it should not be so considered, depending upon the rights to convey and to purchase, and the consequent propriety of that suit : " and again, " The principle is so clearly stated in some of the cases, that it is unnecessary to go through them all. In the most recent

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one, *The Bishop of Winchester v. Payne*(a) the Master of the Rolls, in his clear and luminous manner, states precisely the proposition upon which I put this case; that, though ordinarily the decree binds only the parties to the suit, he who purchases during the pendency of the suit, is bound by the decree, that may be made against the person from whom he derives title, as between the litigating parties; any person, coming in by conveyance pending the suit, is bound by the rights of him, from whom he takes; as to them it is as if no such title existed."

In the *Bishop of Winchester v. Beavor*(b), there was first a mortgage, then a judgment, and lastly, a second mortgage; and on a bill filed for foreclosure by the first mortgagee, it was objected, that the judgment creditor was not a party to the suit. The Master of the Rolls, says the report, inclined against the objection. It is plain, that Lord *Alvanley* in his observations alluded to judgments obtained *pendente lite*, which was not the case before him; and he afterwards says, "A judgment confessed after a bill filed would not do." This then is a distinct authority, that judgments confessed *pendente lite* form no objection to the purchaser's title: and, even under the late Statute, judgments cannot be put on a higher footing than an equitable incumbrance.

It is argued, however, that they must be considered as a legal incumbrance, for the creditor, it is said, can proceed at law, and issue his *elegit*. I admit this would create a difficulty, if the circumstances of the case did not supply the means of avoiding it; but, in the first place, it will be

(a) 11 Ves. 197.

(b) 3 Ves. 314.

It is recollected, that the base fee created or acquired by the deed of 1809 is still continuing, for neither *Andrew* nor *Thomas* entered; on the contrary, they both claimed estates under that deed, served out of the seisin of the trustees, and I can scarcely conceive it possible for a judgment creditor of *Thomas* to enter and revest his estate, after his acts under that deed.

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But, even though I should not be right in this view of the case, *Leland v. Hunt*(a) is a distinct authority, and supplies a principle, upon which I am prepared to act. The decree operates as a declaration of the rights of the parties. It declares, that from 1809, the estate was bound by the trusts of the term for 200 years, which is, therefore, paramount to the demands of the judgment creditors, and the rights of the creditors, whose judgments were obtained *pendente lite*, were as much subject to be bound by the decree, as if parties in the cause. The consequence is, that a good title has been made, which the purchaser is bound to accept.

With this decision the purchaser being dissatisfied, appealed to the Lord Chancellor, before whom the case now came on to be heard.

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Mr. Serjeant *Keatinge*, Mr. *Moore*, and Mr. *Collins*, for the purchaser.

The term of 200 years professed to be sold has now no existence, having been created by a bare tenant in tail, whose estate was never enlarged; it ceased upon his death.

(a) 1 Hog. 364.

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It is, therefore clear, that an action could not be sustained at Law against the purchaser, to punish him for his breach of contract ; in Equity, however, he might be compelled to complete his purchase, if the principle of compensation is applicable to the case. Here the Plaintiffs propose to remedy the defect, by the conveyance of a term from the present owners of the fee ; but can the purchaser be compelled to accept a new term ? It is settled, that a person who contracts for one thing, cannot be compelled to take another ; for instance, a contractor for a freehold will not be obliged to take a chattel interest(a).

Again, supposing the purchaser to be bound to accept a new term, how can Mrs. *Batwell* be compelled to join in the conveyance, if she declines to execute ? The decree, indeed, directs all necessary parties to join, but she was not a necessary party to convey to the purchaser in respect of her original rights ; she was merely a jointress, with a contingent interest in the lands, and that contingency has not arisen ; perhaps, as deriving under her son and *Russell*, she might be bound, if a supplemental bill were filed, making her a party in the character of the owner of the fee.

The next objection is founded upon the judgments recovered against *Thomas Batwell*. The settlement of 1809 was made by a tenant in tail, who neither levied a fine nor suffered a recovery ; that settlement, therefore, did not bind his issue, and, consequently, the estate descended to *Andrew* and *Thomas*, successively, as issue in tail ; and in 1839, *Thomas Batwell* executed a disentailing deed, and thereby acquired the fee, upon which these judgments im-

(a) Treatise on Vend. & Pur. vol. i. 486.

immediately attached. The judgment creditors of *Thomas* have preferable rights to those of parties claiming under the settlement of 1809. But it is said those judgments were obtained *pendente lite*. What then is the effect of *lis pendens*? Is it not simply to give notice of the Plaintiffs' claim in that suit? It does not give validity to the Plaintiffs' claim, or cure any original defect in his case, or confer on him any new or further right. Now *Thomas Batwell* had a clear defence in the present suit; he might have rested immoveably on his estate tail. Why should not his judgment creditors be entitled to the benefit of that defence, which he might have made? Suppose *Thomas* had conveyed the lands to a purchaser for valuable consideration, after the institution of this suit, that purchaser must have been brought before the Court by supplemental bill, and would he not then have been clearly entitled to insist, that as against him the Plaintiffs had not any title? Would it be a sufficient answer for the Plaintiffs to say, "you purchased *pendente lite*?"

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In many cases, a defeasible title may be defeated pending suit; for instance, suppose the case of a voluntary deed, and a bill filed to execute that deed: the Defendant sells the estate for valuable consideration, the purchaser can set up his rights and defeat the Plaintiff (a); and the same observation applies to the case of a settlement, with a power of revocation.

The principle of *lis pendens* is not to create new rights, but to sustain existing rights. In this case, the Plaintiffs

(a) Treatise on Vend. & Pur. vol. iii. 461.

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had not any rights, which they had power to enforce. And even if the defect could be remedied by a supplemental bill the purchaser is not bound to wait, but is at once entitled to be discharged. *Metcalfe v. Pulvertoft*(a) was referred to.

Mr. Serjeant *Warren*, Mr. *Brooke*, Mr. *Monahan*, and Mr. *Molesworth*, *contra*, for the Plaintiffs.

It is not proposed to give the purchaser a new term ; the very term of 200 years created by the settlement of 1809 will be assigned to him. That deed being a conveyance by a tenant in tail was not void, but created a voidable base fee, to be avoided by the entry, for the purpose of avoiding it, of the issue in tail; *Case of Fines*(b), *Machell v. Clarke*(d), *Hartne v. Coughlan*(d). Here there was not only no entry to avoid the base fee, but the disentailing deed executed by *Thomas Batwell* operated as a confirmation of the previously voidable estate. The effect of the Statute *De Donis* was only to secure the rights of the issue, but the issue had power to waive those rights, *Crocker v. Kelsey*(e); and, accordingly it is laid down, *Brooke's Abridgment*(f), that if a tenant in tail makes a lease, not within the enabling Statutes, and after his death the issue in tail accepts the rent, the lease is confirmed. In Mr. *Fearne's Posthumous Works*(g), he expresses a doubt, whether a recovery suffered by the issue in tail, after a fine had been levied by his ancestor, could bar a subsequent remainder, because the effect of the fine was to bar the estate tail, and no right descends to or vests in the issue. The issue, after the death of his

(a) 2 Ven. & B. 200.

(b) 3 Rep. 84, n.

(c) 2 Id. Raym. 778.

(d) 2 Fox & S. 308.

(e) Sir William Jones, 60.

(f) Tit. Acceptance, Pl. 10, 13

(g) Page 442.

Ancestor, in this case, had an election, to confirm or avoid the term of 200 years, by conveying away his estate he has confirmed the term, and deprived himself of that election, *Bettison v. Elways(a)*. *Thomas Batwell* took as a purchaser under the settlement; it must be presumed, that he executed the disentailing deed with a view to the confirmation of that settlement: if he had disclaimed the settlement, he had no title at all, for his father, *Andrew*, might have barred the entail. Mrs. *Batwell* is clearly bound by the terms of the decree: the conveyance to her is subject to the deed of 1809 and its provisions, for that to *Russell* was expressly subject to the term of 200 years.

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Then, as to the judgments, they do not bind the term, having been entered subsequently to its creation, *Leland v. Hunt(b)*; besides that, they were obtained *pendente lite*; and in *Barron v. Barron*, an unreported case, the Court of Exchequer decided, that such judgments do not occasion any objection to the title, even though they may affect the legal estate.

The following cases were also mentioned: *Sackvil v. Earnsby(c)*, *Stapilton v. Stapilton(d)*, *Piers v. Piers(e)*, *Wilson v. Webb(f)*.

Mr. Serjeant *Keatinge*, in reply.

Upon the death of *Lullum Batwell*, the settlor, the estate tail descended, successively, upon his son, *Andrew*, and his grandson, *Thomas*; each of these parties entered, and

(a) *Skinner*, 31. 36.

(b) 1 *Hog*. 364.

(c) *Wynch*, 4.

(d) 1 *Atk.* 2.

(e) 1 *Drury & W.* 265; *Sausse & S.* 379.

(f) 2 *Cox*, 3.

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by that entry was remitted to his rights under the entail but even if they did not enter, still the legal effect would be the same, because, by the descent of the entail upon each successively, the remitter took place, and no entry or other proceeding to assert the title is necessary in such a case. This is the doctrine laid down in *Littleton*(a), and it is founded upon the principle, that the heir, unless remitted, would have no remedy, as he could not bring a *formedon* against himself. Then the fee becomes vested, by the deed of April, 1842, in Mrs. *H. K. Batwell*. How is she to be compelled to join in the conveyance to the purchaser? When the bill was filed, she was not a necessary party to the suit, being only entitled to the contingent annuity charged on the lands, and they must have been sold, subject to that right. She allowed a decree upon sequestration to be obtained against her; but how is it possible to contend that that decree could bind any rights, to which she was not then entitled? With respect to the judgment creditors of *Thomas Batwell*, it is clear, that the purchaser is entitled to have their claims either satisfied or released. It is quite true, that, generally speaking, a judgment confessed *pendente lite* forms no objection to the title, and may be disregarded; but this case is widely different, for, according to the view already submitted to the Court, the judgment creditors have legal rights affecting a legal estate. In addition to this, if the Court compels the purchaser to take this title in the absence, or without the concurrence, of the judgment creditors, it will in effect have established this, that a party having both legal and equitable rights, and dealing with third persons for full and valuable consideration, may, nevertheless, voluntarily defeat

(a) *Littleton*, ss. 659, 660, 661.

the rights of such parties; the Court will pause, before it decides such a question, more particularly, too, in the absence of such creditors.

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THE LORD CHANCELLOR:—

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If the parties wish for a decision upon the legal question involved in this case, they must seek it in a Court of Law, but as I do not see much difficulty in the matter, I may as well state the view which I take.

In 1809, *Lullum Batwell*, who, although he assumed to be seised in fee simple, was, confessedly, only tenant in tail, made a settlement of the property. Now, the effect of that conveyance by a tenant in tail admits of no dispute. It is perfectly settled, that it conveys a fee simple estate, not void, but only voidable; although voidable, however, it bound *Lullum*, the settlor, but might be avoided by the issue in tail, after his death. The first person who could avoid the estate was *Andrew Batwell*; but he was a party to the marriage contract, he derived a benefit under the settlement, which was executed with a view to his preferment, and if he had attempted to avoid that deed at Law, he would have been compelled in Equity to give effect to it. I should require strong evidence to satisfy me, that any act of *Andrew Batwell*, who was bound to give effect to the deed to the extent of his own interest, was intended to avoid that deed. It would be an abuse of words to talk of an estate as only voidable, whilst it is contended that it is in effect actually void. But the effect of its being only voidable is, that the fee does in reality pass, although no doubt it may be avoided. *Andrew Batwell*, it is true, made an entry, and it is contended, that its effect was an avoid-

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ance of the base fee, and the remitter of *Andrew* to his ancient title, and if so, in point of law, there is an end of the case; but if an entry for the express purpose of avoiding the estate was necessary (as, in my opinion, it was), and that *Andrew* was bound to confirm, and not to avoid the estate, why am I obliged to presume, that his entry was made for the purpose of avoiding, instead of accepting and confirming the estate? Did he do any act which would shew an intention of avoiding the estate, or did his issue? Were his acts consistent with such a supposition? Undoubtedly they were not. As far, therefore, as *Andrew's* acts are material in this case, I should come to the conclusion, that his entry had the effect of a confirmation, and not of an avoidance, of the estates created by the settlement of 1809.

Then, as regards *Thomas Batwell*, how does the case stand? Under the settlement of 1809 he was tenant in tail, but under the old settlement he was only issue in tail, with a hope of succession. When, therefore, in 1839, in his father's life-time, he executed a disentailing deed, he was acting under the settlement of 1809, and by the deed of 1840 he bound his rights as far as he could.

In 1840, *Andrew* died, and *Thomas*, upon his death, became tenant in tail in possession, and might have avoided the deed of 1809, if any right to avoid that deed was still in existence. But did he do so? It is conceded that an entry was absolutely necessary, yet he never made an entry. If claim could be sufficient, he made none. But, on the other hand, there is abundant submission to the deed of 1809; for in 1840 he conveyed the estate to *Russell*, for a trifling consideration, expressly subject to the very term,

the validity of which is now the subject of controversy. Here, then, is a clear confirmation by the issue in tail, if confirmation can avail, and nothing like an avoidance; and confirmation will avail to support a voidable estate, or the terms "voidable" and "void" must be held to mean the same thing.

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The authorities, to which I have been referred, shew, that if there has been any alteration of the estate tail, such as is effected by a disentailing deed, there is an end of the estate tail. The provisions of the Statute *De Donis* have no longer any operation; the parties, in all subsequent transactions, are dealing, not with an estate tail, but with the fee.

But, independently of this, could *Russell*, who purchased subject to the deed of 1809, for a sum of 27*l.*, now raise any objection? Clearly not. *Russell's* title is derived from *Thomas*, and *Thomas* claims under *Andrew*, and *Andrew* under *Lullum*, the settlor in the original settlement. To permit *Russell*, therefore, now to raise any objection to that settlement, might be attended with the most dangerous consequences. But, besides all this, there is no question as to his right, for he has executed a consent in the cause, undertaking to join in the conveyance to the purchaser, thus shewing his submission to the decree, and his readiness to give that decree effect. Then, as to Mrs. *Batwell*, the widow, she was a party to the deed of 1809, taking a benefit under it, and was also a party to this suit; she is, therefore, bound by the decree. She purchased from *Russell*, behind the back of the Court, and it has been argued, that the title so acquired is not bound by the decree. But the answer is obvious, that this Court will not allow its orders to be impeded by any innovation

conveyance to a stranger, except as a party to the suit: and so, if a person acquires a new interest during its progress, I compel that party to effectuate the conveyance of that new interest. Mrs. *Batwell* has a higher title than that of *Russell*, she is not subject to the term; and she is clearly entitled to join in the conveyance to the pur-

chaser. The question as to the effect of the judgments recovered against *Thomas Batwell*, still remains to be disposed of.—I am myself called upon to express any opinion as to the decision of the Court of Exchequer, in the case mentioned by Mr. *Montague*. It is, no doubt, a very strong case, and may be perfectly right; upon that I give no opinion. The judgments in this case were all recovered *pendente lite*; the parties entitled to them are, therefore, bound by the decree against *Thomas Batwell*. If any act is required to be done by them, they may be brought before me, either by a supplemental bill, and if not, you may discharge them. I do not, however, see that it is necessary anything should be done by them, and they need not be brought before the Court. Upon the whole, I entirely concur in the report of the Master of the Rolls; but if the petition presented, I will give him a case to the Court of Chancery, as to the first question.

The petition being then read on the part of the purchaser, he was asked if he then said, that he would affirm the decree, with interest on that costs.

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THIS was a petition on the part of Lady *Langford*, for the taxation of certain bills of costs of the Messrs. *Mahony*. The Master of the Rolls had made an order directing a taxation, and the case now came before the Court, upon an appeal from the order of His Honor.

Discussion of the principles, upon which the Court acts, in directing the taxation of a solicitor's bill of costs, after payment.

It appeared that the Honourable *Elizabeth Rowley*, who was one of the daughters of the late Right Honourable *Hercules Langford Rowley*, was entitled, under a certain settlement of the 5th of November, 1791, to an annuity of 600*l.*, late currency, during her life, charged upon several estates, and payable in the following proportions: two-sevenths thereof out of certain estates in the County of Limerick, which were the property of the Petitioner; two-sevenths out of certain other estates in the County of Meath, the property of the late Lord *Langford*; two-sevenths out of cer-

A firm of solicitors were employed by an administrator, to recover a debt due to his intestate, and they had a power of attorney from the administrator, who was resident in England, authorizing them to receive monies, and to act generally for him in all matters connected with

the affairs of the administration. The solicitors paid over to the administrator certain sums, which they received during the course of the proceedings, and retained the residue in payment of their costs; the costs were not delivered to the administrator during his life-time, but after his death, an account was furnished to his executors by the solicitors, setting forth these costs, and applying in payment thereof the sums, which they had retained out of the sums paid to them in the course of the proceedings, and from which it appeared that the costs incurred exceeded the sum retained by a sum of about 10*l.* In this account the executors acquiesced, although it did not appear, that there ever had been any formal settlement of it; and there was no taxation of the costs:—*Held*, affirming the order of the Master of the Rolls, that an administratrix *de bonis non* of the intestate, was entitled to have the bill referred for taxation, and that, under the circumstances, the settlement with the executors of the administrator was not a bar to such right.

A solicitor acting under a power of attorney from an administrator, or a person filling a fiduciary character, stands in the place of such person, and will be held answerable for any misapplication of the trust estate, to which he is a party.

If a trustee employ a solicitor, in relation to the trust estate, and pay him the amount of his costs without taxation, the *cestui que trust* cannot require a taxation of the bill against the solicitor; but in the settlement of accounts with the trustee, he is entitled to have the bill of costs referred to be moderated; and upon such a reference the Master will revise the items in a way similar to taxation; and if the charges appear to be improper, they will be disallowed to the trustee, and he will be left to his remedy over against the solicitor.

Langford v. Nott (1 Jac. & W. 291) is overruled by the cases of *Balme v. Paver* (Jacob, 305), and *Vincent v. Venner* (1 Mylne & K. 212).

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tain other estates in the Counties of Antrim and Londonderry, the property of Sir *Hercules Pakenham*; and the remaining one-seventh out of an estate in the County of Dublin, the property of the late Lord *Langford*. Miss *Rowley* was also entitled to a judgment for 1700*l.*, affecting the estates of the Petitioner and Sir *Hercules Pakenham*, in equal shares.

Miss *Rowley*, who was a person of unsound mind, had been placed in the asylum of Dr. *John Willis*, in England, where she resided until her death, which took place in the year 1830. It had been arranged, that Dr. *Willis* should receive an allowance of 460*l.* per annum, payable half-yearly, for the care and maintenance of Miss *Rowley*, and this sum was regularly paid to him, up to the year 1824; from that period Dr. *Willis* was not paid the allowance which had been agreed upon; the annuity also was suffered to fall into arrear; and at the death of Miss *Rowley* in 1830, there was due to Dr. *Willis* a sum of about 3353*l.* 2*s.* 8½*d.*, for her maintenance, and other expenses incurred for her use.

In the month of May, 1830, Messrs. *Pierce* and *Davies* were employed by the English solicitors of Dr. *Willis* to institute inquiries respecting the estates liable to the said annuity, and to take such proceedings as might be necessary to enforce the payment thereof; and in the month of October, 1831, a bill was filed in the name of Dr. *John Willis*, who had in the meantime obtained administration to Miss *Rowley*, against the present Petitioner, Sir *Hercules Pakenham*, *Hercules* Lord *Langford*, and several other parties, for the purpose of raising the arrears of the said annuity, and also the amount due on foot of the said

judgment for 1700*l*. Lord *Langford* having, by his answer, set up certain defences to this suit, and insisted that his estates were exempted from liability to the annuity or judgment, and that the Petitioner and Sir *Hercules Pakenham* were bound to pay the same rateably between them, an amended bill was filed on the 11th of September, 1832.

On the 27th of February, in the following year, the Petitioner, Lady *Langford*, paid to Mr. *David Mahony* the sum of 2958*l*. 0*s*. 7*d*., being one moiety of the amount of the said judgment, and the interest due thereon, and also her proportion of the arrears of the annuity; this arrangement, it appeared, was made upon an agreement, that the Petitioner should be released from any further claim, and her name struck out of the bill: and a consent to that effect, which was afterwards made a rule of Court, was accordingly entered into; and on the 28th of February, 1833, the Petitioner, and all parties concerned in said suit, in relation to Petitioner's estates, were struck out of the said bill, and a release was executed to the Petitioner by the Messrs. *Mahony*, who had a power of attorney from Dr. *Willis*. This was a general power of attorney, bearing date the 16th of June, 1832, and conferring upon the Messrs. *Mahony* full authority to act in all respects in the affairs of Miss *Rowley*.

On the 1st of December, 1832, and 25th of July, 1833, Sir *Hercules Pakenham* paid his proportion of said annuity and judgment debt, amounting together to the sum of 1967*l*. 3*s*. 9*d*., upon the same terms, and a similar release was executed.

Lord *Langford*, however, neglected to pay his proportion of the arrears of the annuity, amounting to 1186*l*. 16*s*. 4*d*.,

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in consequence of which, and by reason of the defence up by him, and the claim to be altogether discharged th from, another amended bill was filed on the 24th of M 1833, again bringing before the Court the Petitioner Sir *Hercules Pakenham*, as parties Defendants. In 18 Dr. *Willis* died, without having ever brought the caus a hearing; his executors applied for administration *de b non* to Miss *Rowley*, and for that purpose they proved will of Dr. *Willis* in Ireland. In this however they fai as administration to Miss *Rowley* was granted to the sent Petitioner, Lady *Langford*.

It appeared, that in the month of January, 1832, sho after the institution of the suit by Dr. *Willis*, a bill was filed the Petitioner and her younger children, against Lord *La ford*, for the purpose of raising the arrears of her jointi and the portions of her younger children: that on the 3 of November, 1833, a report was made in that cause, fi ing the sum of 1186*l.* 16*s.* 4*d.* to be due by Lord *La ford* to the estate of Miss *Rowley*; that Dr. *Willis* was personal representative; that his demand as such was prio all the other incumbrances affecting the said estates of L *Langford*; that he had filed a bill to enforce payment his claim, and that it would be for the benefit of all p ties, that the receiver in the present cause should forthw pay to Dr. *Willis* the said arrears, amounting to the s of 1186*l.* 16*s.* 4*d.*: and an order was subsequently m in the cause, directing the receiver to pay same to Dr. *Willis*, as the administrator of *Elizabeth Rowley*.

The Petitioner, as the administratrix of Miss *Rowl* having required the executors of Dr. *Willis* to render an count of the personal estate of Miss *Rowley*, which was

received by him during his life-time, a statement was furnished, by which it appeared, that the Messrs. *Mahony* had, in the year 1838, delivered to the solicitors of Dr. *Willis's* executors, an account of their receipts and disbursements, shewing that considerable sums had been from time to time remitted by them to Dr. *Willis*, and that there remained in their hands a balance of 1568*l.* 6*s.* 10½*d.*, which they had applied in payment of their costs, amounting in all to the sum of 1578*l.* 10*s.*, the particulars of which were furnished at the same time; and that thus, upon the entire account, a balance of 10*l.* 3*s.* 1½*d.* was due to them by the estate of Dr. *Willis*. In this account it appeared that, in addition to their own costs, they claimed a credit for a sum of 109*l.* 18*s.* 2*d.* paid by them for costs incurred by the executors in proving the will of Dr. *Willis* in Ireland: and there were some small charges for business done subsequently to the death of Dr. *Willis*. It did not appear that any objection was raised to that account by the executors of Dr. *Willis*, or that any formal settlement of it ever took place: and the costs of the Messrs. *Mahony* were not taxed.

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On the 2nd of November, 1838, an order was pronounced, in the cause of Lady *Langford* v. Lord *Langford* and others, whereby it was ordered, that the receiver should, within ten days, invest in the purchase of Government stock, the said sum of 1186*l.* 16*s.* 4*d.*, and that such stock, when so purchased, should be transferred to a separate credit, and be entitled, "sum impounded to meet the claims of *John Willis*, deceased," being the sum found, by the report of the 30th of November, 1833, to be payable to the said *John Willis*, as administrator of the Honourable *Elizabeth Rowley*, deceased; and it was further ordered, that the Rev. *Peregrine Curtois* and the Rev. *Atwell Lake*, the

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executors of the said *John Willis*, should, within two months, proceed to establish their claims against said fund; and in default of their doing so, it was ordered, that *Lady Langford*, the Plaintiff in said suit, should be at liberty to apply for payment thereof.

Under this order, the executors of *John Willis* filed a charge, on the 7th of May, 1839, and after stating the proceedings, which had been instituted by their testator to enforce payment of his demands, and insisting upon the right to interest on the debt due by *Miss Rowley* to *Dr. Willis*, they claimed to be entitled to apply the sums received by him, in the first place, to pay the funeral and ministratorial expenses of *Miss Rowley*, and then the costs and expenses incurred by him, *Dr. Willis*, in the recovering of the said sums, and in next place, in discharge of the interest which accrued upon the debt due to *Dr. Willis* by *Miss Rowley*, and then in reduction of the principal of the said debt; and they shewed, that by taking the account in this manner there appeared to be a sum of 1189*l.* 8*s.* 5*d.* due to them as the executors of *Dr. Willis*. In a schedule to this charge, which contained an account of the funeral and ministratorial expenses of *Miss Rowley*, the amount of the several periodical sums, which became due for her maintenance and support, and the interest accruing due thereon respectively, the executors claimed credit for the sum of 1578*l.* 10*s.*, being the full amount of the costs of *Messrs. Mahony*, exclusive of the sum of 109*l.* 18*s.* 2*d.*, for the costs of proving the will of *Dr. Willis* in Ireland.

To this charge a discharge was filed on the part of the Petitioner, *Lady Langford*, and she thereby disputed the right of the executors of *Dr. Willis* to interest upon the

arrears of the annual allowance, alleging that she was always ready, from the death of her husband in 1825, to pay her proportion, and that if Dr. *Willis* had ever applied for same, it would have been paid; that the amount claimed by the executors, exclusive of interest, was 3262*l.* 13*s.* 7*d.*, and that the sums paid amounted to 4925*l.* 4*s.* 4*d.*, thus leaving a sum of 1662*l.* 10*s.* 9*d.* for the discharge of the costs and funeral expenses; that the costs, which were stated to amount to 1578*l.* 10*s.*, ought to be taxed; that it was not necessary to have proved the will of Dr. *Willis* in Ireland in relation to this demand, and that therefore the executors were not entitled to the costs of proving same, as against the estate of Miss *Rowley*.

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When the matter came before the Master, an objection was taken, on the part of Lady *Langford*, that he had no jurisdiction to allow to the executors any of the sums specified in the debit side of the account for interest, or for costs and expenses, inasmuch as the order of the 2nd of November, 1838, did not empower the Master to make any such allowance. This objection having been yielded to by the Master, an application was thereupon made by the executors at the Rolls, that the Master, in proceeding under the order of the 2nd of November, 1838, should be at liberty to inquire and report, whether the said *Peregrine Curtois* and *Atwell Lake* were, as the executors of the said *John Willis*, entitled to credit for any and what sums of money, for the funeral and administratorial expenses of the said Honourable *Elizabeth Rowley*, paid by the said *John Willis*, and for the amount of any costs and expenses properly and necessarily incurred by them, or by their testator, in realizing the personal estate of the said *Elizabeth Rowley*; and that if the Master should find that they, or any of

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them, had made such payments, or incurred such costs and expenses, then that he should tax and ascertain the amount, and allow credit to the executors for the same, in proceeding under the said order. The application was made at the Rolls on the 11th of February, 1841, but the Master of the Rolls refused to make any rule upon the motion, being of opinion, and expressly declaring, that the Master, in proceeding under the order of the 2nd of November, 1838, was at liberty, and should have inquired, whether any and what sum was due to the estate of Dr. *Willis* out of the personal estate of Miss *Rowley*, after all just credits and allowances, and that the executors should procure a report under the said order, on or before the last day of the then ensuing Easter Term ; and the consideration of the costs of the motion was reserved until the return of the report.

The proceedings before the Master were thereupon resumed, and on the 24th of May, 1841, he made his report, and after setting forth that it had been admitted before him, that if interest was not properly chargeable upon the several sums due to Dr. *Willis*, that his executors had not any claim or right to the said sum of 1186*l.* 15*s.* 4*d.*, in said order of the 2nd of November, 1838, particularly mentioned ; and that inasmuch as he was of opinion that interest was not properly chargeable on these sums, he found that the said executors had not any claim against said sum of 1186*l.* 16*s.* 4*d.*, or the funds, in which the same had been invested.

To this report no exception was taken, and, on the 31st of May, 1841, an order was made in the said cause of Lady *Langford* v. Lord *Langford* and others, directing that the fund, which had been so impounded, as before stated, should

be transferred to Lady *Langford*, and that the executors of Dr. *Willis* should pay to her the costs of proceeding under the order of the 2nd of November, 1838, and of the report, and that both parties should abide their own costs of the motion made in February, 1841. The fund was accordingly transferred to Lady *Langford*, and the costs, which were awarded to her, were subsequently paid.

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On the 30th of November, 1842, the present petition was presented, on the part of Lady *Langford*, which, after stating several of the matters hereinbefore mentioned, particularly in relation to the employment of Messrs. *Mahony* by Dr. *Willis*, the proceedings so instituted, the several sums received by them, and the amount retained by them for costs, and further, that a large proportion of the costs were incurred for searches after the amount due by the Petitioner, Lady *Langford*, and Sir *Hercules Pakenham*, had been paid by them respectively, and also that the said bills of costs were in other respects highly objectionable, prayed that it might be referred to one of the Masters to tax said bills of costs, so far as the same were properly incurred against the estate of the said *Elizabeth Rowley*, as between solicitor and client, and that the said solicitors, Messrs. *Pierce* and *David Mahony*, might be ordered to account for the sums received by them on foot of the assets of the said *Elizabeth Rowley*, and to refund such portion thereof as should be taken off, and also such other sums, if any, with which they had improperly debited the estate of the said *Elizabeth Rowley*, in the account furnished by them to the executors of Dr. *John Willis*.

Mr. *Pierce Mahony*, in his answering affidavit, stated, that the business in question had been managed by his

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brother and partner, Mr. *David Mahony*, who at the time conducted the town business of the firm ; that he was himself unacquainted with any of the details, and that he was now deprived of the benefit of the assistance and knowledge of his partner, Mr. *David Mahony*, who was then of sound mind ; that the searches, which were principally objected to, and other proceedings, appeared to have been made under the advice of the late Chief Baron *Wolfe* (at the bar) ; that the several charges in the bills of costs were, in his opinion, *bonâ fide* and reasonable, and conforming to the rates certified and approved of by the Master of this Honourable Court. In addition to this, Mr. *A* denied the right of the Petitioner, Lady *Langford*, to a taxation of the costs, and relied on the settlement made with the executors of Dr. *Willis* ; he further stated that the said bills of costs were among the credits claimed by the executors of Dr. *Willis*, in proceeding under the will of the 2nd of November, 1838, and that the Petitioner might, at that time, have had a taxation thereof, but that inasmuch as she did not then think proper to go into a investigation of the costs, she must be considered as having waived her right, and ought not now to be permitted to have a taxation of said costs.

On the 4th of February, 1843, the case was argued before the Rolls, when His Honor was pleased to make an order referring it to one of the Masters to tax the said costs, directing the Messrs. *Mahony* to furnish, on oath, a

was a credit, to which they were not entitled against the assets of the said *Elizabeth Rowley*, and that the same should be allowed by the Master as a credit against their costs.

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From this order Mr. *Pierce Mahony* appealed.

Mr. Serjeant *Keatinge*, Mr. *H. G. Hughes*, and Mr. *Maley*, in support of the appeal. Argument.

The order of His Honor cannot be sustained. In the first place, upon general principles, the Petitioner has no right to call for any taxation. The Messrs. *Mahony* were neither her solicitors, nor the solicitors of Miss *Rowley*; they were employed on the part of the English solicitors of Dr. *Willis* to conduct their affairs in Ireland; they are, therefore, to be looked upon as their agents, responsible only to them, or, at most, to their client, Dr. *Willis*. It will not be contended, that the Messrs. *Mahony* are under any greater liability to account, from their filling the character of solicitors, than if they were ordinary agents; and how could it be argued, that the present Petitioner, as now representing Miss *Rowley*, could compel the mere agent of Dr. *Willis* to account, merely because in the course of business some part of the assets of Miss *Rowley* might have passed through his hands? The agent is responsible to his principal, and the solicitor to his client alone; and no third person, notwithstanding what his right may be to call for an account from the client or principal, can compel the solicitor or agent to account with him, on this plain and intelligible ground, that there is no privity of contract between them; in such a case the parties are not without redress, on the contrary, they are entitled to a remedy against the principal or client by whom the agent or solicitor was em-

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ployed ; in the present case the Petitioner may file a bill against the executors of Dr. *Willis*, and seek an account of the estate of Miss *Rowley*, which came to his hands, and in what manner he applied the same ; in such a suit she may be entitled to rely on the fact, that the payment of these costs was a misappropriation of the assets, and if she succeeds, the estate of Dr. *Willis* must be answerable, to make good the *devastavit*. But this is the utmost extent of the right. It is altogether unnecessary to consider whether the result would be different, if a case of collusion between Dr. *Willis* and the solicitors, in the misapplication of the assets of Miss *Rowley*, was established, or that Dr. *Willis's* estate was shewn to be insolvent. No such case has been even alleged ; on principle, therefore, it appears to be quite clear, that the right contended for on the part of the Petitioner does not exist. But even if it did, it is submitted that it is now lost. In the first place, the costs have been paid by the parties primarily liable, and that too, after an opportunity of investigating these costs had been afforded. It is now quite settled, that whenever a bill of costs has been paid, although without taxation, the Court will not afterwards grant a taxation, unless it be shewn, that in the bill of costs there are contained fraudulent charges ; *Horlock v. Smith(a)*, *Waters v. Taylor(b)*. Here the parties have not attempted to make out such a case. The petition, it is true, contains a general charge, that the costs are “highly objectionable,” but it does not specify a single objectionable item ; there is a statement, that a great part of the costs were incurred in searches in the registry, after the Petitioner and Sir *Hercules Pakenham* had paid the amount due by them ; but these searches

(a) 2 Mylne & C. 495.

(b) 2 Mylne & C. 526.

were made under the advice of one of the most eminent counsel at the time at the Bar, and were occasioned in consequence of the magnitude of the several estates charged with the annuity, and the variety of the incumbrances which it was necessary to trace, in order to make the suit perfect. In the second place, the time, which has been permitted to elapse, forms a most important feature in this case, and is such as to disentitle the party to have these costs taxed. It appears, from the account furnished to the executors of Dr. *Willis*, that the last remittance which they made was in 1833, and that from that time they retained in discharge of these costs all sums, which were paid to them. Dr. *Willis* is now dead more than six years, and if, upon a taxation of the costs, it should turn out that the Messrs. *Mahony* had been overpaid, and that they were in consequence called upon to refund any of the monies so retained, they would be now unable, in consequence of the lapse of time, to recover from the executors of Dr. *Willis* such monies, although at the time a clear right to make such charge did exist. The Court will not be auxiliary in pronouncing an order, which, if calculated to be of any benefit to the Petitioner, must work an irreparable injury to the Messrs. *Mahony*, and which injury is solely attributable to the time which the Petitioner, Lady *Langford*, has permitted to elapse before she has thought proper to bring forward the present application. Still further, on the part of the Appellant, it is submitted, that the Petitioner, Lady *Langford*, has waived her right to any taxation, by reason of her having admitted the costs as a fair credit, on the occasion of the reference under the order of the 2nd of November, 1838, and the subsequent proceedings; the executors of Dr. *Willis* were then before the Court, and the rights of all parties could have been adjusted; at that time

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Lady *Langford* ought to have insisted upon a taxation of these costs; they were then claimed by the executors of Dr. *Willis* as credits to which they were entitled; Lady *Langford* thought proper at that time to allow them; she did not ask for any taxation; the only question then discussed was as to the right to interest? It is, therefore, now too late for her to require these costs to be taxed, when the executors are absent, and the Messrs. *Mahony* cannot have any remedy over against them. As to the costs of proving the will of Dr. *Willis* in this country, it is clearly a good credit for the Messrs. *Mahony* against the executors of Dr. *Willis*. The Petitioner may be entitled to recover the amount thereof from those executors, but there does not exist any principle, upon which it can be contended that she has a right to deprive the Messrs. *Mahony* of this sum, thus paid by them in obedience to the direction of their employers.

Mr. Serjeant *Warren*, and Mr. *Francis Goold*, in support of the order.

It is admitted, that the costs in this cause have never been taxed, but were allowed by the executors of Dr. *Willis*, without any investigation; and the right of the Petitioner to have these costs now taxed is resisted upon grounds, none of which can be supported. It is argued, in the first place, that the Messrs. *Mahony* being employed by Dr. *Willis*, were responsible only to him or to his executors; but it is to be remembered, that it was by Dr. *Willis*, as the personal representative of Miss *Rowley*, and in that character, and to recover part of her estate, that the Messrs. *Mahony* were so employed; the Petitioner is now her representative, and invested with all the rights and privileges that Dr. *Willis* was entitled to, and the right to call for a

Taxation of the costs incurred in the administration of the assets, and to demand an account from the solicitors, devolves upon each person in succession, who fills the character of personal representative. But even supposing for a moment, that it could be said that the Messrs. *Mahony* were to be considered as the solicitors of Dr. *Willis* alone, still he was but a trustee of the property in relation to which those costs were incurred; the Court will pause before it establishes this rule, that the *cestui que trust* has no right to tax the bill of the trustee's solicitor; if such a rule did prevail, a trustee might incur costs to any amount at the expense of his *cestui que trust*. Another ground upon which the right to a taxation is resisted, is, that the costs have been paid; but can it be said that this retainer by the Messrs. *Mahony* is to be considered as a payment or settlement, within the meaning of the rule, when it is remembered, that this was a retainer permitted by parties not at all liable to the costs; the proper fund for the payment of these costs was the estate of Miss *Rowley*, in relation to which these costs were incurred; what right then, it is to be asked, had the executors of Dr. *Willis*, who were altogether uninterested in the assets of Miss *Rowley*, to permit the Messrs. *Mahony* to retain a part of those assets, in discharge of their untaxed bills of costs? and, as evidence of the negligence of the executors, in relation to this matter, they actually permitted the Messrs. *Mahony* to claim a credit for proving the will of Dr. *Willis* in Ireland, which charge it would be impossible to support as against the estate of Miss *Rowley*. It is said, that in the result, the order pronounced at the Rolls will work a great hardship and injury to the Messrs. *Mahony*. The fact is not so. But even if it were, the Messrs. *Mahony* have only themselves to blame. When they thus applied the monies, which came to

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their hands, in payment of their costs, they had full knowledge that it was a trust fund with which they were dealing, and that the parties, with whom they were in commission, were not authorized to represent it; if, therefore, there was a misapplication of the trust fund, on the part of the executors, in thus paying the costs of the Messrs. *Mahony* without taxation, the Messrs. *Mahony* are equally responsible with the executors, and cannot now protect themselves in the manner they seek to do. Every person who acquires personal assets by a breach of trust or *devastavit* in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Here the executors permitted the Messrs. *Mahony* to apply a portion of the assets of Miss *Rowley*, in payment of a debt due to them by Dr. *Willis*. The Messrs. *Mahony* were privy to this misapplication, and this case thus contains every element, which was wanting in *Keane v. Roberts*. It is contended, that the Petitioner ought to have pointed out specific items of objection in the costs: in the first place the rule is not so; but, even if it were, are not the objections, which have been stated in the petition, in reference to the charges for the registry searches, sufficient? Is not the Petitioner entitled to some explanation why so large an expense was incurred, amounting in all to more than 700*l.* and that too after she had paid in full the whole amount demanded from her, obtained a release from the parties, and had the bill dismissed. It is somewhat startling to hear it alleged, that such a payment as this is to be made without explanation. With regard to the last objection relied on, that the Petitioner has waived her right, by not insisting on a taxation, while the reference under the order of Novem-

ber, 1838, was pending, it is to be observed, that nothing then took place, which could be considered as amounting to a waiver; the Petitioner did not object to a taxation; no such point ever arose in the office. The executors of Dr. Willis contended, that there was a large sum, beyond the costs, due to them by the estate of Miss Rowley. This was the only matter in dispute at that time; there was no controversy as to the costs, and it would have been irrelevant, at that time, to have sought for a taxation of the costs.

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This is a case of great difficulty, and I shall take time to consider, before I dispose of it finally. There is no imputation upon the Appellant, either as a professional man, or as a member of society. The question is merely one of law, whether the Court may, consistently with the principles upon which it acts, direct a taxation at the instance of the Petitioner.

Generally speaking, if a person acting in a fiduciary character employ a solicitor, and pay him the amount of his costs, the party beneficially interested cannot himself require a taxation of the bill against the solicitor. The relation of attorney and client subsists only between the solicitor and the person, who employs him; and there would be no safety in the dealings of mankind, if, after the person who employed, and was competent to retain, the solicitor, and who had funds at his disposal for the payment of his costs, has actually paid the costs, another person, who was not the client, but claimed an interest in the property, should come forward, and insist upon having a taxation of

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those costs. The party beneficially entitled to the fund not without a remedy, if he has sustained any injury by the payment of the costs, for, in taking the account of the trust property, he may insist that the payments to the solicitor were improperly made, and if he shew that, the trustee can only get credit for as much as was properly paid by him.

Independently of the 109*l.* 18*s.* 2*d.*, the difficulty here is as to the situation of the parties. There is no difficulty about the rule of law, which is well settled ; but I do feel a great deal of difficulty as to the relation in which the solicitors stood to the several parties. Dr. *Willis* was a creditor of the intestate, and he took out administration to her, and Messrs. *Mahony* acted as his solicitors. In the course of the discussion, I asked under what authority Messrs. *Mahony* received the sums of money, which were paid to Dr. *Willis* as administrator, for, in their capacity of solicitors merely, they would not have been authorized to receive them ; it appears they did so under a document executed in 1832, by which Dr. *Willis* constituted them his attorneys, to act for him generally in all matters connected with the administration of the intestate's estate ; provided with that authority, they acted not merely as the solicitors of the administrator, but also as the personal representatives of the intestate, as far as the delegated authority conferred by that instrument could constitute them such. In that double capacity, they received, at various times, assets of Miss *Rowley*, and at first remitted the amount, from time to time, to Dr. *Willis*. The last payment was made in 1833, and after that no sum was remitted, and no account was furnished until 1838. In the year 1832, at the period of the grant of the power of attorney, and at all the

subsequent periods, they had in their hands balances sufficient to cover the amount of the bills of costs claimed by them, and no credit was given for the amount of those balances, which must, therefore, be taken to have been set off against the amount of the costs; they did not invest those balances, nor pay interest on them, as it would have been their duty to have done, if they had not applied them in payment of the costs; I must consider, therefore, that they appropriated those monies, from time to time, in payment of the bills of costs, as they were incurred, otherwise they would be retaining improperly monies, which formed part of the assets of the intestate.

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At the end of three years, after the death of Dr. Willis the administrator, Messrs. Mahony render an account to his executors, in which they take credit for sums amounting to nearly 1600*l.*, as having been applied in payment of costs, and amongst these costs were some small items incurred after the death of Dr. Willis. There is no evidence, upon the face of the documents of any settlement of that account; it is sworn however, and I do not question the statement, that the account was accepted by the executors, but it was not until after the representative character of Dr. Willis had ceased by his death; and although the executors, being liable for the costs of Dr. Willis, and so far interested in the correctness of the account, might properly settle that account, and allow the solicitors the amount of their costs, yet it strikes me, that I must consider the payment as having been made, without the direct intervention of Dr. Willis, by Messrs. Mahony, as his attorneys, in his character of administrator, to themselves, in their character of solicitors for the administrator; so that, acting in that double character, what they receive in one capacity as

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attorneys of the administrator, they retain in the other as his solicitors. Can that be considered a payment within the settled rule of this Court, that after payment of costs by the client, he shall not be let in to a taxation, without shewing improper charges? I apprehend that such a payment can hardly be sustained as a bar to a taxation of the costs.

The subsequent dealings of the parties lead to great difficulty. After the death of Dr. *Willis*, Lady *Langford*, who had paid her proportion of the arrears of the annuity, filed a bill against Lord *Langford*, to raise the arrears of her jointure, and the amount of certain charges for her younger children. A report was made in that cause, finding that there was due to the representatives of Miss *Rowley*, a sum of 1186*l.* 16*s.* 4*d.*, and by an order of the 2nd of November, 1838, this sum was directed to be impounded to meet the claim of Dr. *Willis*, and detained in Court to abide the event of that claim. Accordingly, in that suit, the executors of Dr. *Willis*, thinking to establish a claim to interest, came in and filed a charge, claiming, among other things, interest on the sums from time to time due to their testator, on account of the allowance payable for the charge and care of Miss *Rowley*; and Lady *Langford*, as Miss *Rowley's* representative, filed a discharge, denying that any thing remained due from her estate to the estate of Dr. *Willis*. The Master, in proceeding under the order, found a difficulty in going into the account (in fact, an objection was taken, that the Master had no jurisdiction to go into such account): and the executors of *Willis* applied to the Court for a direction to the Master, in proceeding under the reference, to inquire and report, whether the executors were entitled to credit for the expenses incurred by *Willis*.

in relation to the administration, which he had taken out to Miss *Rowley*, and also for the costs incurred by them and their testator, in realizing the personal estate of Miss *Rowley*; and if so, that the Master should tax and ascertain such costs and expenses, and allow the executors credit for the same. The Master of the Rolls refused to make any rule upon the motion, but it appears, that he expressly declared, that in proceeding under the order of the 2nd of November, 1838, the Master should have inquired whether any thing remained due to the estate of Dr. *Willis*, after all just and fair allowances; and the executors were directed to procure a report, under the order, before the last day of the ensuing Term. The proceedings were then resumed in the office; but the controversy appears to have been confined to the question of interest, for the Master, by his report of the 24th of May, 1841, states, that it was admitted before him, that if interest was not properly chargeable upon the sums due to Dr. *Willis*, his executors had no claim to the sum impounded; and then he finds, that as he was of opinion that interest was not properly chargeable, the executors had no claim against the fund. In this report the executors acquiesced. It is now contended, on the one side, that there was a waiver on the part of Messrs. *Mahony* of their right to object to the taxation of those costs, inasmuch as they were the parties, who brought forward the application at the Rolls to have the account taken; whilst, on the other side, Messrs. *Mahony* contend, that the conduct of Lady *Langford* amounted to a waiver of the right now insisted on, on her behalf, against these gentlemen, because the executors of Dr. *Willis*, who were liable to Messrs. *Mahony*, have been allowed to escape in consequence of her act. I cannot deny that this circumstance has great influence upon the question before me. The ex-

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ecutors, with the approbation of Messrs. *Mahony*, for a reference to the Master, to ascertain what was due to their testator's estate, and to have the costs taxed. Lady *Langford* resisted the application, insisting that the order was sufficient; that under that, all just and fair advances would be made; and that there was, consequently, no necessity for the order which was then sought. Now, proceeding under that order, the claim for 109*l.* 18*s.* 2*d.* might have been disallowed, for it was unquestionably a payment that could not be charged against the assets of Miss *Rowley*; but Lady *Langford* rejected the remedy, which she then might have had. The executors, upon that, withdrew from the contest; and she lost the opportunity of having the bills of costs taxed. The Court had then all the parties before it, the personal representative of Miss *Rowley*, the solicitors and the executors of Dr. *Willis*, the former administrator; but Lady *Langford* rejected the opportunity, and now, the matter having been closed, after an interval of two years, she asks the Court to examine the accounts against the Messrs. *Mahony* alone, in the absence of the representatives of the person, by whom they were employed, and who was responsible to them. I am disposed to say that even though I should be of opinion, that, under the peculiar circumstances of this case, Messrs. *Mahony* were liable to have their bills taxed in the first instance upon the application of Lady *Langford*, the opportunity for such taxation has been lost; however, not only on account of the great importance of the case, but from that deference and respect, which is due to the opinion of the learned Judge, by whom the order has been made, I shall consider the case fully, before I decide.

As to the 109*l.* 18*s.* 2*d.*, I am satisfied it is not a demand

which is properly chargeable against the estate of Miss *Rowley*; it was an expense incurred after the death of Dr. *Willis*, for his executors; Messrs. *Mahony*, who incurred it, were the attorneys, under a special authority, of the personal representative, and had assumed the character of personal representatives themselves, as far as the instrument, under which they acted, could make them so; as such personal representatives therefore they had monies in their hands, which they knew were part of the assets of the intestate; they incurred costs, properly chargeable against the estate of the administrator, under whose authority they acted, after his death, and they retained the amount of those costs out of the assets of Miss *Rowley*, whose representative he was. It is admitted, that the executors of Dr. *Willis* had no right to direct that payment to be made, but it is contended, that Messrs. *Mahony* were justified in retaining the money. Unless, however, I were of opinion, that Messrs. *Mahony*, who were, by virtue of the power of attorney from the administrator, personal representatives, and were also solicitors, might have wasted the assets in any way they pleased, I could not allow that charge. In that respect, therefore, the order of the Master of the Rolls is right.

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THE LORD CHANCELLOR :

April 27.

This case is one of great importance. It appears not to have been fully argued at the Rolls; for, as often happens, the parties were not aware of its importance, until after the order, against which the appeal is brought, was pronounced. It has, however, since been very fully argued before me. The main question raised, was as to the original right of Lady *Langford* to have the bills of costs of Messrs. *Ma-*

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hony taxed. The facts were these. *Elizabeth Rowley* was entitled to an annuity of 600*l.* a year, for her life, charged on several estates, situate in different parts of this country ; but being a person of unsound mind, she was placed under the care of Dr. *Willis*, in England, with an allowance to him for her maintenance, clothing, &c. ; she remained under his care until her death. At the period of her death, a sum was due to Dr. *Willis* for her maintenance, exceeding, I think, 3000*l.* ; and there were also six years' arrears of her annuity due to her estate. Dr. *Willis*, upon her death, applied for administration as a creditor, in order to enforce payment of the arrears of the annuity, and thereby to pay himself what was due to him. It appears that a Mr. *Taylor*, one of the next of kin, was about to obtain administration, but Dr. *Willis's* solicitors applied to him to withdraw, and allow administration to be granted to Dr. *Willis* ; he accordingly yielded to their request, as the grant to the Doctor was intended only to enable him to recover his demand, and Dr. *Willis* obtained administration. The persons to pay the arrears of the annuity were Lord *Langford*, Lady *Langford*, and Colonel *Pakenham*. There was also a judgment for 1700*l.*, to which Miss *Rowley* was entitled, and which was payable by Lady *Langford* and Colonel *Pakenham*. After administration was obtained, three sums were paid to Dr. *Willis*, on account of the arrears of the annuity and judgment. On the 1st of December, 1832, Colonel *Pakenham* paid 1085*l.* 6*s.* 1*d.* on account of his share ; in February, 1833, Lady *Langford* paid 2958*l.* 0*s.* 7*d.*, as her share of the annuity and judgment ; and in July of the same year, Colonel *Pakenham* paid the further sum of 881*l.* 17*s.* 8*d.* Those payments exceeded 4900*l.*, and for this sum Dr. *Willis* was accountable. Deducting from these sums the amount due to himself, it will appear, that the

whole of his debt was paid as early as July, 1833, and that the sum of between 1600*l.* and 1700*l.* was left in his hands to pay costs, funeral expenses, and expenses of administration. The sums, which I have mentioned, were paid as follows: Dr. *Willis*, as administrator, in the latter end of the year 1831, filed a bill against all the parties, who were liable to the annuity, for payment of the arrears. In 1832, Messrs. *Mahony*, who had been originally employed by the London solicitors of Dr. *Willis*, obtained a power of attorney from him, to act for him as administrator, and to receive all monies which were payable to him as such. The two sums of 1085*l.* 6*s.* 1*d.* and 2958*l.* 0*s.* 7*d.*, were paid to Messrs. *Mahony* in the cause. Colonel *Pakenham* paid the 881*l.* 17*s.* 8*d.*, which was due for his share of the annuity and judgment, to Dr. *Willis* himself. The result was, as I have stated, that in 1833 there was not a shilling due to Dr. *Willis*; in point of fact, he personally received more than the amount of his debt; the payments made to him by Messrs. *Mahony* were, in July, 1833, 1500*l.*, and in August of the same year, 900*l.* Those were the only sums paid by them; but Dr. *Willis* himself received 881*l.* 17*s.* 8*d.*, which was paid to him by Colonel *Pakenham*, so that, altogether, Dr. *Willis* had himself received, in the month of August, 1833, nearly 20*l.* more than the debt due to him by Miss *Rowley*. The payment by Colonel *Pakenham* he no doubt applied in satisfaction of the debt due to himself; but, in point of fact, as between the parties, that debt was extinguished in the preceding month by the payments made to Messrs. *Mahony*. In the year 1835, Dr. *Willis* died; no bills of costs of Messrs. *Mahony* had been delivered to him in his life-time, nor were any delivered to his executors until a late period. In the account furnished by Messrs. *Mahony* to the executors, they deducted out

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of the balance of the monies received a considerable amount for costs. Their bills of costs unsettled amounted to 1578*l.* 10*s.*; it does not appear that these bills were ever examined by the executors of Dr. *Willis*, but they were allowed to the full amount; and as between them and Dr. *Willis's* estate, they would be entitled to full credit for the amount so allowed, but as between them and the persons entitled to the assets of Miss *Rowley*, the case would be different.

It was seriously argued, that as between Dr. *Willis* and Messrs. *Mahony*, Dr. *Willis* might direct any appropriation of this money he pleased, and that if he thought fit to direct payment out of it of any debt of his own, for instance, his coachmaker's bill, he could do it, and that the administrator *de bonis non* would have no remedy against Messrs. *Mahony*, but could only pursue Dr. *Willis* for the amount; but, as a proposition of law, that is wholly untenable, and I am anxious there should not be any misapprehension upon the subject in the minds of solicitors, who may be placed in similar circumstances. Messrs. *Mahony* had a general power of attorney from the administrator, authorizing them to act for him; they stood in his place, and, therefore, were answerable for any misapplication of the assets, to which they were parties.

If that be so, how did the case stand at the death of Dr. *Willis*? It is not pretended that these bills of costs had ever been taxed. There was no check; for Dr. *Willis* gave Messrs. *Mahony* absolute power over the fund; the hand to receive was also the hand to pay. This, therefore, is not the case of a payment of a solicitor's bill by the personal representative, who employed him; these bills were

not furnished during Dr. *Willis's* life-time, not until three years after his death, and two years before these bills were so furnished, administration *de bonis non* had been taken out by Lady *Langford* to the intestate; she has presented a petition, asking for a taxation of these costs, and the question is, whether these untaxed bills of costs could, as an item in account, bind the administratrix? To whom, I would ask, did the money, which was in the hands of Messrs. *Mahony* at the time of the death of Dr. *Willis*, belong? The right to it remained in suspense until the grant of the administration. Dr. *Willis's* executors did not obtain administration *de bonis non*, and he had been paid his debt in full before his death; therefore he had no interest in the assets. Supposing that there were no costs due, this money belonged to the administratrix *de bonis non*, and to her alone, as part of the assets of the intestate, Miss *Rowley*. If assets are in the hands of a third person, at the death of the administrator, the administrator *de bonis non* alone can recover them; they belong to him, and not to the executors of the former administrator. If a judgment were recovered by the administrator, upon his decease that would not go to his executors. It is true, that the administrator *de bonis non* could not have had the benefit of it at Law, until the Statute of William III.(a), in this country, enabled him to sue out a *sci. fa.* upon it; but he was always entitled to the benefit of it in Equity. If goods had been seized by the sheriff at the suit of the administrator, or if money had been levied by a sale of the goods, and remained in the sheriff's hands, it is not the executor of the administrator, but the administrator *de bonis non*, that is entitled to receive the proceeds of the execution. The case of *Clay v.*

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(a) 7 Will. III. c. 6, s. 9.

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Willis(a) shews clearly what the rule of law is, though the decision there was adverse to the administrator *de bonis non*. There a party had mortgaged an estate, with a power to the mortgagees to sell; he devised the estate to trustees, and appointed them his executors; and after his death, the mortgagees sold the estate, and paid the surplus produce of the sale to the agent of the mortgagor's executors. The administrator *de bonis non* of the mortgagor brought an action against the personal representative of the agent, to recover the money, and it was held that he could not recover, because the money was not part of the assets of the testator; the executors held it as trust money, and not as assets, and, therefore, it was not recoverable by the administrator, but if it had been assets, he would have recovered: that shews the rule of law upon the subject to be perfectly settled.

As to the taxation of the costs, there was a case of *Langford v. Nott(b)*, before Sir Thomas Plumer, in which he held, that where a third person, by agreement, has paid a solicitor's bill, he cannot apply for a taxation. That was laying down a stricter rule than could be maintained at the present day, for it cannot be disputed now, that a person so situated would be entitled to apply for a taxation. I was counsel for the Petitioner in that case, and Sir Thomas Plumer gave me time to see, if I could find any authority in support of the application, but as there was none, the case was not mentioned again. However, subsequently, in the case of *Balme v. Paver(c)*, Lord Eldon decided, that a party, who, being liable under a bond of indemnity,

(a) 1 Barn. & C. 364.

(c) Jac. 305.

(b) 1 Jac. & W. 291.

■ paid the debt and costs to the Plaintiff's solicitor, could
 ■ have these costs taxed; and in *Vincent v. Venner*(a), Sir
 ■ *John Leach* held, that where a third person paid a solicitor's bill of costs, he was entitled to the same rights as the client with respect to taxation. In both of these cases, which appear to me to have been properly decided, Sir *Thomas Plumer's* decision was in fact overruled. I do not, however, mean to say, that it would be so in the case of a trustee or personal representative, who had paid the solicitor's bill: I have already stated, that a trustee may pay the solicitor, whom he has chosen to employ, and that the parties beneficially interested will not be entitled to apply for a taxation; the trustee is competent to employ a solicitor, and to settle with him, and I cannot permit that to be disturbed; he is, moreover, personally liable to the solicitor. In *Worrall v. Harford*(b), a man in trade having become embarrassed in his circumstances, by an arrangement with his creditors, vested his property in trustees, upon trust to sell, and to pay thereout, in the first instance, all the costs and expenses connected with the execution of the trust. The trustees employed as their solicitor the Plaintiff, and considerable costs having been incurred by him, in relation to the trust, he filed a bill, seeking to be declared a creditor under the trust deed, and paid the amount of his costs out of the fund; a demurrer was put in on the part of the trustees, and Lord *Eldon* allowed it, holding, that though the solicitor of the trustees had the same right against them personally, as he had against any other client, yet, that he had no claim against the trust fund. Supposing that to be so, how does the case stand, if a trustee pay the solicitor? By the rule of this Court,

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(a) 1 Mylne & K. 212.

(b) 8 Ves. 4.

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if the trustee pay the solicitor's bill of costs, without taxation, and then a demand is made by him against the trust estate for the amount, the *cestui que trust* has a right to have the bill referred, not for taxation, but to be moderated, and upon that reference the Master will revise the items in a way similar to taxation; and if upon the reference the charges appear not to be proper charges, they will be disallowed to the trustee, and he will be left to get back from the solicitor the sums which he has so paid to him in the best way he can. That was decided in *Johnson v. Telford*(a): and although costs have been paid by the trustee, and he has been allowed them in account by the *cestui que use*, who has released, yet the *cestui que trust* will be entitled to make use of the name of the trustee to have the costs taxed, if the trustee can still tax them, giving him a proper indemnity(b). Lord Eldon held, that a solicitor cannot be allowed to interpose the payment of his bill of costs by a person in the situation of a trustee, in a question between himself and the parties (*cestuis que trust*), for whom he was at the time aware that the person who paid him was no more than a trustee. That goes a great way to decide the present question. Who was the party that had a right to tax the costs here? Clearly the administrator: and has anything been done to bar that right? There has been no payment here. As it has been argued by Mr. Serjeant Warren, this is not a case of payment, but of retainer by the solicitors, of money which belonged to the administratrix *de bonis non*. But even if there had been a payment of the costs, the administratrix would be entitled to tax them, upon making a proper case. Now the case she has made is of this nature: Lady Langford says that great ex-

(a) 3 Russ. 477.

(b) *Hazard v. Lane*, 3 Mer. 285.

pense was gone to in searches which were not necessary, and for which she is not liable; and that Messrs. *Mahony* paid, out of the assets of the intestate, the expense of proving the will of Dr. *Willis*, which ought not to have been paid out of that fund. I mention these only as instances. A bill had been filed, as I stated, to raise the amount of the arrears of the annuity, to a portion of which *Lady Langford's* estate was liable. In the month of February, 1833, she paid all that was due for her share of the annuity, and a consent was entered into, that the bill should be dismissed against her without costs; and not only was there a consent signed, but a solemn deed was executed, after much discussion and deliberation, fully releasing *Lady Langford* from all further liability to the claim. But no sooner was that done, than an amended bill was filed, bringing *Lady Langford* again before the Court, and that upon a case, which had been put on the files of the Court in the answer of *Lord Langford*, which answer had been filed some time before the consent had been entered into. That surely requires explanation. Now look at the charges for searches; the first searches were made in 1831, and the charges for them amount to about 15*l*. The second set of searches was made in 1832, and the charges for them amount to between 8*l*. and 9*l*.; there was a third set of searches made also in 1832, the charges for which amount to 183*l*.; and lastly, after the bill had been dismissed against *Lady Langford*, the solicitors instituted new searches, in part relating to her estate, for which a sum of 510*l*. is charged, and 19*l*. 18*s*. for a copy of registry searches; so that, in recovering the arrears of this annuity, which had been regularly paid up to the period of six years prior to the death of the intestate, an expense is incurred for searches alone amounting to more than 700*l*. I am not surprised that *Lady Langford*

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should be anxious to investigate those charges, and no one can say that they ought not to be explained. No doubt, the expense for searches is a great grievance, not only to the clients, but also to the solicitors themselves, and one which calls loudly for a remedy. There is a measure now in progress, introduced at my suggestion, for the purpose of partially remedying the evil; but a more extensive remedy may be required, and I shall probably call on the Judges for their assistance, to consider whether the law in this particular cannot be placed on the same footing as in England, and parties saved from such enormous expenses. I am far from saying that the searches in the present case may not have been necessary, but certainly they require explanation. The charges for those searches were all allowed in the bill delivered to the executors of Dr. *Willis*, and they furnish a ground for the present administratrix being allowed to investigate that bill.

The amended bill filed against Lord *Langford*, after Lady *Langford* had paid the full amount to which she was liable, and after Dr. *Willis* had received the whole of his demand against the intestate, did not proceed far, for in 1835 Dr. *Willis* died, and the suit having abated by his death, his executors, in order to enable them to continue it, proved his will in Ireland, and attempted to procure administration to Miss *Rowley*. Costs were incurred in that attempt to the amount of 109*l.* 18*s.* 2*d.*, and it is insisted at the bar that Messrs. *Mahony* were entitled to be paid these costs out of the assets of the intestate. There is not the slightest foundation for such a claim. It was a race for administration to Miss *Rowley* between the executors of Dr. *Willis* and the next of kin; and the executors were beaten in the race. But why should the costs of it be paid out of the

assets of Miss Rowley? The Doctor's representatives failed in their attempt to obtain administration, and they must abide the consequences of it. The Master of the Rolls properly disallowed that claim, and I concur with him in thinking that it ought not to be allowed.

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So far the case is perfectly clear. But then, there is another view of the case, which struck me when the cause was opened, so as to lead me to think, that I should be obliged to refuse the taxation. Certain proceedings took place after the death of Dr. *Willis*, which, it is contended on the one side, amount to an acquiescence by Messrs. *Mahony* in the taxation of the costs, and from which they cannot now withdraw; and on the other it is said, amount to a bar, and a relinquishment of the right of Lady *Langford* to a taxation, in consequence of her having then waived her right. I was inclined to take this latter view, until I had looked into the papers, and no case, that I have seen, shews more strongly the importance of doing so. The facts were these. Lady *Langford*, in 1832, filed her bill against Lord *Langford*, for the purpose of raising the arrears of her jointure, and the portions of her younger children. By an order of the 16th of July, 1833, in this cause, it was referred to the Master to inquire and report, in what manner the rents received by the Receiver should be applied, and also to report the arrears due upon the incumbrances, the annuities and outgoings payable out of the estate, the priorities of the same, and the rents applicable to their payment. Under this order, the Master, by his report of the 30th of November, 1833, reported the annuity, which was payable to Miss *Rowley*, and the manner in which the same was charged, and that at the time of the death of Miss *Rowley*, there was due to her by Lord *Langford*, as

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the proportion of the annuity payable by him, and in 1861. 15s. 4d.; that this was the first charge affecting the estate; that Dr. *Willis*, as her administrator, had filed a bill for the purpose of raising the arrears of the annuity, and that it would be for the benefit of all parties, that the Receiver should, out of the funds in his hands, pay off the annuity. In January, 1834, Messrs. *Mahony* had notice of this; they were apprized that there was this sum in the hands of the Receiver, for the purpose of paying the balance due to Dr. *Willis*, as administrator of Miss *Rowley*, and they were called on to apply for payment of it, but they did not apply; the report did not provide for costs; but in July, 1834, Messrs. *Mahony* received notice of a consent in Lady *Langford's* suit, to pay the balance to Dr. *Willis* with costs, yet they pressed on their own suit. In 1835, nothing effectual having been done, Lady *Langford* sent notice of a motion to pay over this sum to her, as administratrix of Miss *Rowley*. Messrs. *Mahony* appeared upon that motion, and got a stop put upon the fund; and an order was made, directing the Receiver to invest the stock, and that the stock should be transferred to a separate account, to be entitled, "Sum impounded to meet the claim of the representatives of *John Willis*, deceased;" and the executors of Dr. *Willis* were ordered, within two months, to proceed to establish their claim against the fund, and in default thereof, Lady *Langford* should be at liberty to apply for payment thereof; and the costs of the reference and report were reserved. In proceeding in the office upon that order, the parties differed. Mr. *Mahony* swears that Lady *Langford* objected to the Master's allowing to the executors any of the charges specified in their charge against the interest which they claimed, or for the costs or expenses incurred inasmuch as the Master was not empowered to make

such allowance under the order of reference. The Master yielded to the objection; and the executors applied to the Court in February, 1841, representing that the Master would not investigate the account, and praying for an order, directing the Master to take the account of the sums properly paid by Dr. *Willis* for funeral expenses, and in realising the assets, and that the costs might be taxed, if necessary, and that they might be allowed interest. Lady *Langford* opposed this application, and insisted that no new order was necessary. The Court refused to make any new order, but declared, that in proceeding under the order of 1838, the Master was at liberty to inquire, whether any and what sum was due to *John Willis* out of the personal estate of Miss *Rowley*, after all just credits and allowances. The matter was then renewed in the office. The executors, by their charge, claimed to be entitled to the costs, which they had paid to Messrs. *Mahony*, to the expenses of probate, and to interest on the arrears. The Master made his report under that reference, finding that there was nothing due to the estate of Dr. *Willis*. He was of opinion that there was no interest due on the arrears of the allowance, and that the executors had no claim on the fund. Lady *Langford*, in her discharge, required the costs to be taxed, objected to the costs of proving Dr. *Willis's* will, and said that she believed a balance was due from the estate of Dr. *Willis*. The Court confirmed the report, and by an order of the 31st of May, 1841, directed the fund to be paid over to Lady *Langford*, and ordered the executors to pay the costs of proceeding under the order of November, 1838, and the report thereunder. When the case was opened before me, I understood that Messrs. *Mahony* had offered a taxation, which Lady *Langford* had refused; but on looking through the papers, I find that Messrs. *Mahony*

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did tender a taxation of the costs, but it was for the purpose of being allowed them, and the interest, out of the fund. Lady *Langford*, by her discharge, did not object to the taxation; on the contrary, she required that the costs should be taxed, but she objected to paying them, and denied the right of the executors to pay them; but if the costs were to be paid, so far from objecting to the taxation, she demanded that they should be taxed. If the executors had prosecuted that inquiry successfully, and established their claim against the fund, the costs undoubtedly would have had to be taxed; but they withdrew from the inquiry, and the Master reported against them, and paid the costs of the proceedings. Lady *Langford* now prays for a taxation of the costs, which by her discharge she asserted she was entitled to have taxed, and, in my opinion, she is entitled to have them taxed. I shall, therefore, dismiss the petition of appeal, with costs. At the same time, I do not mean to make any charge against Mr. *Mahony* or his partner. The searches were made under the direction of counsel of great ability, and it may turn out that they were properly made. If any injury should arise to the petitioner, in consequence of his being deprived of the assistance of his partner, he may apply to the Court, but at present I do not think it necessary to make any order on that head.

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1843.

April 28.

BY indenture bearing date the 21st of November, 1837, and made between *John Jervis Emerson*, of the first part, *Christopher Taylor* and *William Taylor*, of the second part, and *Francis T. Porter*, of the third part, after reciting a lease of the 27th of May, 1816, whereby *John Staunton Rochfort* demised the town and lands of Ballybanogue, situate in the County of Wexford, to *Michael Emerson* (the father of *John Jervis Emerson*), for three lives or thirty-one years, whichever should last the longest, at the yearly rent of twenty-four shillings per acre; and after reciting further a deed of the 8th of January, 1824, which was the settlement executed upon the occasion of the marriage of the said *John J. Emerson* with *Miss Jane Daly*, whereby the lands comprised in the said lease were settled, after the death of the father and mother of the said *John Jervis Emerson*, upon *John Jervis Emerson* for life, subject to an annuity of 50*l.* for his sister, *Jane Emerson*, with remainder to his issue; and after reciting further, that *Michael Emerson* and *Margaret Emerson*, the father and mother, were both dead, and that *John Jervis Emerson* was indebted to *Christopher Taylor* and *William Taylor* in the sum of 400*l.*, and had agreed to convey his life interest to *Francis T. Porter* as a trustee, for the purpose of securing the repayment of said sum, and also for the other purposes thereafter mentioned and expressed, the said deed witnessed, that the said *John Jervis Emerson* conveyed the said premises, and all his

A. being indebted to the Plaintiffs in a sum of 400*l.*, and being entitled to a life estate in certain leasehold premises, conveyed, by deed of the 21st of November, 1837, his life interest therein to a trustee, upon trust, "out of the interest, proceeds, or annual rent thereof," to pay the head-rent, to which the lands were subject, the premiums of insurance on a certain policy of insurance (which *A.* had effected upon his life, and which policy was assigned by a separate deed), and also to the said Plaintiffs the said sum of 400*l.*, with legal interest from the date thereof, at the rate of 6*l.* by the year, until the same should be fully paid off and discharged, and upon payment thereof, to reconvey the same to *A.* or his assigns. The deed did not contain any covenant for payment on the part of *A.*:—*Held*, upon the true construction of the deed of November, 1837, that the Plaintiffs were not to be considered as mortgagees, or entitled to a sale, but only to have a Receiver, and the trusts of the deed carried into execution under the direction of the Court.

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estate and interest therein, to *Francis T. Porter*, and his heirs, for and during the life of the said *John Jervis Emerson*, in trust, out of the interest, proceeds, or annual rent thereof to pay the head-rent payable on said premises, under and by virtue of the said lease of the 27th of May, 1816, and also the premium of insurance on the life of the said *John Jervis Emerson*, insured with the Eagle Insurance Company, the sum of 500*l.*, and also to pay over to the said *Christopher Taylor* and *William Taylor* the said sum of 400*l.* with legal interest from the day of the date thereof, at a rate of 6*l.* by the year for every year, until the same should be paid off and discharged, and from and after the payment thereof, then to reconvey to the said *John Jervis Emerson*, or his assigns, the said demised premises; and further it was agreed by and between the parties, that the said *Francis T. Porter* should have power to pay off and discharge the said sum of 400*l.*, by instalments of sums not less in amount than 40*l.*, and that the said *Christopher* and *William Taylor*, their executors, administrators, and assigns should accept of the same.

The deed then contained covenants on the part of *John Jervis Emerson*, for good title and further assurance, with proviso, that *John Jervis Emerson*, notwithstanding anything therein contained, should be at liberty to make lease for any term of years not exceeding thirty-one years, at the best improved rent, and without fine: there was no covenant in the deed for payment of the 400*l.*

By deed of the 28th of December, 1837, reciting the deed of the 21st of November, 1837, and that *John Jervis Emerson* was indebted to the said *Christopher* and *William Taylor* in the sum of 400*l.*, *John Jervis Emerson* ass

to *Francis T. Porter* the policy of insurance with the Eagle Insurance Company, together with all interest and advantage to be had thereby, to the extent, however, and to the amount only of such losses as the said Messrs. *Taylor* should sustain by reason of the aforesaid loan, and to the uses and upon the trusts of the said deed of the 21st of November, 1837.

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The bill was filed by the Messrs. *Christopher and William Taylor* stating these two deeds ; that *Porter* had not executed same, or gone into possession of the lands thereby conveyed to him ; that the whole of said sum of 400*l.* was still due to the Plaintiffs, and also a large sum for premiums paid by the Plaintiffs for the purpose of maintaining the said policy of insurance.

The bill prayed that the Plaintiffs might be considered as mortgagees of the premises comprised in the deed of the 21st of November, 1837, and that an account might be taken of what was due to them for principal and interest, and also for the amount of premiums paid by them on said policy of insurance, and that what should be so found due, should be declared to be a charge upon the said lands and premises, and for payment of said sum by the Defendant *Emerson* ; and in default thereof, for a foreclosure and sale ; or if the Court should be of opinion, that the Plaintiffs were not entitled to a sale, then that an account might be taken of the rents and profits of the lands and premises from the 21st of November, 1837, and that *Emerson* should account for what he had received, or without wilful default might have received, and that *Emerson* should be decreed to pay to the Plaintiffs what should be so found due and owing for principal and interest, and premiums as aforesaid ; and

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that in default thereof, *Emerson* might be decreed to convey to the Plaintiffs, or to a trustee for their use, the said lands, by indenture of mortgage, or in such other manner as the Court should consider proper, and for a Receiver.

The Defendant, *Porter*, by his answer to the bill, stated that he had never in any manner interfered in the trust of the deed of the 21st of November, 1837, and submitted to act as the Court should direct.

The Defendant, *Emerson*, did not put in any answer, and an order was obtained to take the bill *pro confesso* against him. The cause now came on to be heard upon this order, and upon bill and answer as against the Defendant, *Porter*.

Argument.

Mr. *M'Kenna*, and Mr. *Francis Brady*, for the Plaintiffs.

The deed of November, 1837, though, perhaps, not in terms a mortgage, was yet evidently intended by the parties to be substantially so. An antecedent debt is recited to have existed, and the instrument in question was executed to secure and provide for its repayment. It is true, that there is no covenant on the part of the debtor for repayment, but still this is not sufficient to take away from the deed its distinctive character, namely, that of a security for an antecedent loan; and there is contained in it a proviso, enabling *Emerson* to make leases, which is now commonly inserted in all mortgage deeds. However, should the Court not be disposed to treat the instrument in question as a simple mortgage, it will regard it as a trust, to be carried into execution by a sale or mortgage. The principle is now well established, that where lands are conveyed by deed, upon trust, out of the rents and profits

thereof, to raise a gross sum, this Court will extend the natural meaning of these words, and direct a mortgage or sale, to effect the object of the parties; *Lingon v. Foley*(a), *Baines v. Dixon*(b), *Allan v. Backhouse*(c); in which latter case, Sir *Thomas Plumer*, after reviewing all the authorities, stated the rule as laid down, adding, "that it had now become a technical rule of construction, not permitting the Court to exercise any judgment." The words in this deed are, "the interest, proceeds, or annual rent thereof," which is an *a fortiori* case, for the word "interest," which did not occur in any of the previous cases, would of itself carry the entire estate which *Emerson* had in the lands. The premises are subject to a considerable head-rent. The Plaintiffs have been obliged to pay the premiums on the policy of insurance; and the Defendant is but tenant for life. Under these circumstances, the Court is bound to assist *bona fide* creditors, such as the Plaintiffs are, having such an insufficient security. It cannot be said that this is like a Welch mortgage. In the first place the deed is executed to a trustee, and he is not even to apply the whole of the rents in payment of the mortgage; again, the intention of the parties plainly was, that *Emerson* should remain in possession; he is given a leasing power; and the deed contains no covenant for quiet enjoyment. Again, the clause enabling the trustee to make payments of sums not less than 40*l.*, is inconsistent with such a security; there is, therefore, no pretence for saying that the transaction can be considered a Welch mortgage.

Mr. O'Hara, for the Defendant, *Porter*.

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(a) 2 Chan. Ca. 205.
(b) 1 Ves. Sen. 41.

(c) 2 Ves. & B. 65; Jac. 631.

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THE LORD CHANCELLOR :—

There does not appear to me to be any serious difficulty in this case. *Emerson* being indebted to the Plaintiff the sum of 400*l.*, and being entitled to an estate for life in certain leaseholds, and being also possessed of a policy of insurance for 500*l.*, secured the debt in the following manner : he conveyed the leaseholds to a trustee, upon trust out of the interest, proceeds, or annual rent thereof, to pay the head-rent payable out of the said premises, and also the premium of insurance on the life of the said *Emerson*, insured with the Eagle Insurance Company, the sum of 500*l.*, and also to pay over to the said *Christopher* and *William Taylor* the said sum of 400*l.*, with legal interest from the day of the date thereof, at the rate of 6*l.* the year for every year, until the same should be paid and discharged, and after payment thereof, then to receive to *Emerson*. Now, according to the authorities, I will spell out the intention of the deed, and to endeavour to ascertain whether “rents and profits” mean the whole interest, or only the annual rents and profits. I think that the parties referred to the latter, namely, the annual rents and profits. The words are, “the interest, proceeds, annual rent.” The first trust, in discharge of which the rents were to be applied, was to pay the head-rent ; that was an annual outgoing. The next was the premium on the policy of insurance ; that, in like manner, was clearly to be paid out of the annual rents. There is no pretence saying, that it was intended that either of these payments should be raised by sale or mortgage. Why, then, should there be any distinction as to the third object, which is the payment of the principal and the interest of the debt ; that was but one general trust intended for all the purposes, that must be administered in the same manner with regard

all ; and consequently, I think, there is no ground for contending that the Plaintiffs, as mortgagees, are entitled to a sale.

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Now the policy of insurance, which was for 500*l.*, and was assigned by a separate deed, shews distinctly the groundwork of the arrangement : for under the deed assigning the leaseholds a fund was provided to meet the premiums, and on the dropping of the life, there would be a sum of money arising from the insurance, which would be more than sufficient to discharge the principal sum. I think, therefore, that the parties did not intend that the amount of this debt should be raised by a sale of the leaseholds ; all that the Plaintiffs are entitled to is, that the trustee, *Porter*, should enter into possession, or that the Receiver already appointed should be continued. I shall direct the trusts of the deed to be carried into execution, under the direction of the Court, and declare that the parties are not to be considered as mortgagees, or entitled to a sale. Let the Receiver be continued ; and there should be liberty to all parties to apply.

Decree the trusts of the deed bearing date the 21st of November, 1837, to be carried into execution under the direction of this Court. Declare that the Plaintiffs are not entitled, as mortgagees, to have a sale of the lands and premises. Let the Receiver be continued, and let him pay his balances from time to time to the Plaintiffs, in liquidation of their demand and interest. Liberty to Plaintiffs to apply to the Court, as there may be occasion. Costs to be paid out of the funds to be received by the Receiver.

Decree.

Reg. Lib. 87, fol. 310, 1843.

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April 28.

Two persons, in whom were vested, under an Act of Parliament, the right to the tolls and profits arising from a certain road, for a term of fifty years, conveyed, by a deed of the 27th of May, 1827, the same, and all their estate and interest therein, to *A., B., and C.* (the Defendant) upon certain trusts therein mentioned; and subject thereto in trust for the said *A., B., and C.*, their executors, administrators, and assigns, as tenants in common, for their own use and benefit, for the residue of said term of fifty years; and the deed contained a provision, that in case any of the said trustees should be unable to join in the direction and superintendence of the

said road, it should be lawful for any two of the said trustees to act of themselves in the management of said road, and in all other things relating to the execution of the said trusts. They to which the said *A. and B.* were entitled under the said deed, having become subvested in the Plaintiff, and *C.* (the Defendant) having taken upon himself the exclusive control and management of the road, and insisted upon his right thereto, and also upon paid a salary for such his trouble and supervision:—*Held*, upon a bill filed by the Plaintiff disputing such right, that the Defendant *C.* was entitled to the sole management of the road, but that his claim for salary could not be maintained.

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BY an Act of Parliament, passed in the 38th year of Majesty George III., for the repairing the turnpike leading from the city of Dublin to Kilcullen Bridge in county of Kildare, it was enacted, that for and during term of fifty years from the passing of the Act, the right to the tolls therein appointed to be raised and collected was vested in *John Anderson, George Taylor, Alexander Taylor*, and the executors and administrators each and every of them, subject to the several conditions and clauses in the said Act contained, and among others to the following, that is to say, after reciting that the said *John Anderson, George Taylor, and Alexander Taylor* had, by a certain article of the 29th of June, 1798, bound themselves, and each and every of them, and the heirs, executors, and administrators of each and every of them, to pay a penal sum of 20,000*l.*, conditioned for the repairing and improving said road for the space of fifty years, and to make and construct the several improvements and works in said Act mentioned, for the convenience of the public, it was enacted that if, after five years from the passing of said Act, the said *John Anderson, George Taylor, and Alexander Taylor* should, upon petition, appear to the Lord Chancellor or any part of said road was not in complete repair, it should be lawful to levy the said penalty of 20,000*l.* upon the said *John Anderson, George Taylor, and Alexander Taylor*.

and to sequester the tolls of said road, and apply same in the manner in said Act set forth.

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By a deed of the 24th of January, 1799, and made between the said *John Anderson*, *George Taylor*, and *Alexander Taylor*, reciting the said Act of Parliament, and that under and by virtue thereof, all the right, title, and interest in the said tolls thereby appointed to be raised and collected had become vested in the said *John Anderson*, *George Taylor*, and *Alexander Taylor*, the said parties mutually agreed and covenanted with each other, to participate in all expenditures, fines for forfeitures, penalties, and losses whatsoever attending upon or incurred by the improvements and repairs of the said road, and to share, in equal proportions, all the profits and advantages whatsoever arising therefrom; and that in case any of the said parties should happen to die in the life-time of the others of them, that the share, proportion, and interest of the party so dying should not go to the survivors, but should enure to the respective executors, administrators, or assigns of the person so happening to die.

The interest of *John Anderson* in his one-third having become subsequently, by deed of the 27th of September, 1804, assigned to *Alexander Taylor*, by deed of the 25th of May, 1827, made between the said *Alexander Taylor*, of the first part, the said *George Taylor*, of the second part, and *Archibald Taylor*, *George Taylor*, the younger, and *William Taylor* (the Defendant in the present cause), the three sons of the said *George Taylor*, of the third part, after reciting the title of the said *Alexander Taylor* to two-thirds, and of the said *George Taylor* to one-third, of said tolls, the said *Alexander Taylor* and

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William Taylor, in consideration of natural love and affection, granted and assigned all their estate and interest in the said tolls to the said *Archibald Taylor*, *George Taylor*, the younger, and *William Taylor*, upon the terms following, that is to say: in the first place, to pay thereout for the necessary repairs and improvements of the said road, and to discharge the interest upon certain standing debts and charges therein particularly mentioned and then upon certain other trusts, under and by virtue of which, all the right and interest in the said tolls, after the decease of the said *Alexander Taylor* and *George Taylor*, the elder, and their respective widows, became vested in the said *Archibald*, *George*, and *William Taylor*, and their several and respective executors, administrators, and assigns, for their own use and benefit, share and share alike as tenants in common, for the residue of the said term of fifty years. And the deed concluded with the following clause: "And whereas it may frequently occur, that one or other of the said trustees *Archibald Taylor*, *George Taylor*, the younger, and *William Taylor*, may be absent from Ireland, and therefore, or from some other cause, unable to join in the direction, superintendence, and management of the said road, and in the discharge and execution of the aforesaid trusts, now, to prevent the inconvenience which might otherwise ensue therefrom, it is hereby expressly declared and agreed by and between the said parties hereto, that it shall and may be competent and lawful for any two of the said trustees, in the absence of the said third trustee, and they are hereby expressly authorized and empowered to act of themselves in the direction and management of the said road, and of the tolls and duties arising therefrom, and in all other matters relating to the said road, concerning the discharge or execution of all or any part of the said trusts."

the trusts of these presents, or in the giving or signing receipts or vouchers relating to the premises, or any of them, in as legal, valid, and binding, and in as full and ample a manner as all the aforesaid three trustees might or could do, or might or could have done."

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Alexander and George Taylor, the elder, and their respective widows, having died subsequently to the execution of this deed, and the interest of *Archibald, George, and William Taylor* having vested in possession, *Archibald Taylor* departed this life on the 15th of March, 1828, having by his will bequeathed his estate and interest in his one-third to his wife, *Mary Anne Taylor* (the Plaintiff in the present cause), and to the said *George Taylor*, and the survivor of them, and the executors, &c., of such survivor, to hold upon certain trusts therein mentioned. Subsequently, by deed of the 19th of June, 1841, and made between the said *George Taylor*, the younger, of the one part, and the Plaintiff of the other part, the said *George Taylor*, in consideration of the sum of 3500*l.*, assigned and made over to the Plaintiff, her executors, administrators, and assigns, all the estate and interest to which he was entitled, under and by virtue of the deed of the 25th of May, 1827, hereinbefore stated, and afterwards departed this life, some time in the said year, 1841.

The bill in the present case was filed by the Plaintiff, *Mary Anne Taylor*, as representing two-thirds of the profits of the said tolls, against *William Taylor*, in whom the remaining one-third was vested. The bill set forth the Act of Parliament, and the several deeds hereinbefore stated, and charged that the tenure of said tolls, and the possession of the profits and advantages arising therefrom, was strictly

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conditional, and liable to be forfeited, on failure of the Plaintiff to fulfilment of any of the conditions contained in the Act of Parliament, and that any deficiency of repair would subject the Plaintiff to the penalty of 20,000*l.*; that the profits from said tolls were very considerable, amounting to nearly 2000*l.* per annum, but that their extent depended to a great degree upon the general management of the various details of the business, and the skill and efficiency with which the superintendence was conducted; that there was great room for fluctuation of either profit or loss in the revenue, on account of the opportunity which existed for mismanagement and imposition in the minor details, connected with the employment of numerous workmen and contractors, involving an expenditure of nearly 3000*l.* per annum, whereby that great loss might ensue to the Plaintiff if the supervision was not under the control of a manager whose qualifications the Plaintiff had reason to feel a confidence in.

The bill charged, that since the death of *George Taylor* the Plaintiff had made every exertion to have the road placed under the direction of a proper manager, and she expected, from her interest in the property, that she would have had more control over the management of the road, and opportunity of seeing that the repairs were properly conducted; but that all her endeavours had been rendered ineffectual by the opposition of the Defendant, *Liam Taylor*, who had come over to this country from London, where he had hitherto resided, and had, immediately after the purchase by the Plaintiff from *George Taylor* in 1841, entered upon the management of the said road, without the consent of the Plaintiff, had taken upon himself to control and direct the workmen, to order the

tracts, receive the tolls, and disburse the expenditure upon said road, without the concurrence of the Plaintiff, or in any way permitting her to interfere.

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The bill, after further stating, that the Defendant refused to pay to the Plaintiff her full two-third shares or proportions of the surplus tolls or profits, and charging that the Defendant had no right to retain any part thereof as salary, and that his conduct in so doing was unjust and illegal, and that the Defendant had no right to an exclusive control over the road, nor was he entitled to deduct any sum whatever out of the two-thirds which belonged to the Plaintiff, prayed an account of the tolls and profits received, or which, without wilful default, might have been received by the Defendant, from the time when he entered upon the management of the road in 1841, and of all necessary disbursements made on account of the expenditure upon repairs and other outgoings upon said road, and the particulars thereof, and that the Defendant might be held personally accountable for all losses or injuries which might be sustained by the Plaintiff in the premises, by the default of the Defendant, or those employed by him, without the concurrence of the Plaintiff, and that in the meantime a Receiver might be appointed, to collect the tolls, issues, and profits of the said road; that the Defendant might be removed from the management of the said concern, and repairs of the road, and a fit and proper person, to be approved of by this honourable Court, might be appointed to direct and superintend, and generally manage the said concern, pursuant to the requirements and conditions of the said Act of Parliament.

The Defendant, by his answer, insisted that he was en-

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titled to the sole and exclusive care and superintendence of the road ; that, by the deed of the 25th of May, 1827, the Messrs. *Alexander* and *George Taylor*, to whom the property had been originally granted, had, with a view to the proper and efficient and skilful management of this property, confided same to the Messrs. *Archibald* and *George Taylor*, the younger, and this Defendant, and the survivor and survivor of them ; that this Defendant, as the survivor and so long as he conducted himself with fidelity, and the road was kept in proper repair, and skilfully managed, and the Defendant stated that the bill did not contain a single charge to the contrary,—was entitled to such exclusive control, and that no person, during this Defendant's life, had any right or authority to interfere with this Defendant in his management of said road. The Defendant, by his answer, admitted, that under the Act of Parliament above referred to, the right to the profits from the said road was strictly conditional, but he denied, that upon failure to any of such conditions, the Plaintiff was personally liable to the penalty of 20,000*l.* ; that on the contrary, the person who was subject to any penalty was the Defendant himself, as the executor both of the said *George* and *Alexander Taylor* ; and that by reason thereof, he had a greater interest than the Plaintiff in having the road kept in repair, and the conditions of the Act fulfilled.

The Defendant by his answer further stated, that he had assumed the care and management of the property in question, it had been properly conducted, and as evidence thereof he stated, that the several coach proprietors who used the road had expressed themselves perfectly satisfied with the state of repair ; that he had repeatedly called on the Plaintiff to state any act of mismanagement in re-

said road, or any thing shewing incompetence or want of integrity on his part, but that the only reply he ever could obtain from the Plaintiff was, that she had no confidence in his management. The Defendant also stated, that the Plaintiff had no just ground for any dissatisfaction, for that as result of the arrangements made by the Defendant since he entered upon the superintendence of the property, was, that in the month of September, 1843, the toll-gates upon the road had been let at an increase of 858*l.* per annum over that at which they had been hitherto let.

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The Defendant by his answer further stated, that during the life of *George Taylor*, the elder, the management of the road had, by mutual arrangement, been intrusted to him; that a salary of 400*l.* per annum had been allotted for his care and trouble; and that the said *George Taylor*, up to the period of his death, which occurred in 1836, had constantly discharged the said duties, and received such salary, which was always considered barely as an equivalent for his trouble; and the Defendant submitted, that he was in like manner entitled to be paid a salary of 300*l.* per annum as such present manager; that the duties, devolving upon him in that character, required him to devote a very considerable portion of his time, and also to expend large sums in travelling along, and superintending said road; the Defendant admitted that he had retained a sum of 300*l.* per annum out of the profits of the said road, as his salary, but that he had always regularly rendered to the Plaintiff a just and true account of the income and expenditure, and that, in point of fact, until very recently, the only matter in dispute between them, was as to the amount of the salary which the Defendant was entitled to receive, and which,

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the Defendant stated, he had repeatedly offered to submit to arbitration.

It appeared from certain books of account, which were produced in evidence, that *George Taylor*, the elder, in the year 1827 to the period of his death, in 1836, had been intrusted with the care and management of the road, and had been allowed a salary of something exceeding 400*l.* per annum, which was regularly charged in the accounts as an item of expenditure; that upon his death, in 1836, the conduct of the property passed into the hands of *George Taylor*, the younger, and so continued until the execution of a deed of June, 1841, whereby *George Taylor*, the younger, assigned over his interest to the Plaintiff; there was, however, no evidence of any salary having been allowed to, or any claim for such salary made by, the said *George Taylor*, the younger.

On the part of the Defendant, the following letter, addressed by the Plaintiff to the Defendant, was read:

“ November 17, 1841

“ DEAR SIR,—I request that you will immediately send me my quarter's road money, which was due at the 5th of October.

“ Your's, truly,

“ M. A. TAYLOR

“ I permit you to retain 50*l.* for yourself.

“ *William Taylor, Esq.*”

Argument.

The *Solicitor-General*, Mr. Serjeant *Warren*, and *H. G. Hughes*, for the Plaintiff, contended that the Defendant was not entitled to have the sole and exclusive man-

ment of the property in question ; the Plaintiff had a much larger interest at stake than the Defendant ; independently of which she was exposed to a heavy penalty, if the road was permitted to get out of repair. With respect to the claim for salary, it was a claim directly opposed to what had now become a sacred rule, namely, that a trustee should not derive any benefit from his trust(a).

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Mr. Moore, Mr. W. Brooke, and Mr. J. A. Wall, for the Defendant, submitted, that if ever there was a case in which the Court would be disposed to relax the rule, the present was that case, where the Defendant was obliged to devote the entire of his time to the superintendence of the execution of the trust, and at a very considerable pecuniary expense ; it was true, that there was no stipulation in the deed of May, 1827, providing for such a state of things ; but the former manager had been allowed a salary, and this was in itself quite sufficient to warrant the Court in authorizing the continuance of such a practice ; *Const v. Harris(b)*. With respect to the Defendant's right to the sole and exclusive control of the property, there could be no doubt ; the clause, with which the deed concluded, was decisive on the point. Neither was the Plaintiff subject to the liability, which she apprehended : for the article of June, 1798, which was referred to in the Act of Parliament, only af-

(a) During the course of the argument in this case, the Lord Chancellor observed upon the inconvenience resulting from the order in which, according to the present practice, the counsel addressed the Court, and stated, that in future, the arrangement which he wished to be adopted should be as follows : the leading counsel for

the Plaintiff, as previously, to state the Plaintiff's case ; the junior counsel on the same side to call the proofs, and speak to the case generally ; the Defendant's counsel then to be heard according to seniority ; and the Plaintiff's second counsel to reply.

(b) Turn. & R. 496.

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fectured the Defendant, as being the ex cutor both of *George* and *Alexander Taylor*.

Judgment. THE LORD CHANCELLOR :—

This case appears to me to be free from any legal difficulty. By the provisions of the deed of 1827, the tolls in question were vested in three persons, upon trust, in the first place, to provide for the necessary repairs and expenses of the road, and then to permit the parties who, under the trust, were entitled to this property, to receive the surplus according to the shares specified in the deed. By that deed, the legal interest was vested in these three trustees, and they are the persons, who are to manage the concern. This is, I think, the natural construction of the deed, and the clause, with which it concludes, corroborates this view. It is insisted by the Defendant, *William Taylor*, who is the survivor of the three trustees, and who has also a beneficial interest in a third of the profits, that he is entitled to the exclusive superintendence of the entire concern, and that he is to have a salary for this management. The evidence in the case introduces a new state of facts : for, instead of the property having been managed by the three trustees, one should have supposed, it turns out, that the whole concern, from the period of the execution of the deed, was managed, not by one of the trustees, but by one of the assignors, one of the *cestui que trusts*, Mr. *George Taylor*, the elder, and that he was permitted to receive, in round numbers, 400*l.* per annum, for his trouble. It was urged that though this gentleman had parted with his legal interest, nevertheless he was paid a salary for his trouble, and this was stated to be the groundwork of the Defendant's case, as shewing that there was a settled practice existing

in the firm, which would justify the claim of salary on the part of the Defendant. But how are the facts? This *George Taylor*, the elder, died in 1836, and *George Taylor*, the younger, one of the trustees, succeeded. How, or why, does not appear. The deed of 1827 gave him no such authority; the clause at the end of the deed did not provide for that event; it authorized two of the trustees to act, without the assistance of the third, but did not empower one of the trustees to carry on the management of the trust, in the absence of the other two. It was observed by Mr. Serjeant *Warren*, that I must presume that *George Taylor*, the younger, acted without any salary. I think this is a fair observation. No evidence has been adduced to shew that any salary ever was paid to him. There is a charge in the accounts of 25*l.* quarterly for a salary, but without stating to whom the same was paid; and as the Defendant knew very well that *George Taylor*, the elder, received a salary of 400*l.*, although the accounts are silent on that head, I take it for granted, that if *George*, the younger, received any salary, the Defendant could have informed the Court of the fact.

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After the death of *George*, the elder, there was an interruption of the trust, for I find that a sequestration issued against *George*, the younger, and the present Defendant, as the personal representatives of *George* the elder, in the cause of *Taylor v. Taylor*, by reason of some default in the payment of the assets of their testator, *George*, the elder, and that sequestrators were actually appointed over the tolls. There was thus a suspension of the performance of the trust. After the removal of the sequestrators, the Defendant came over from London, and was desirous to exercise his legal rights, and superintend the road himself. The

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letter(a) addressed by the Plaintiff to her own mind and which was read by him to the Defendant, and which becomes evidence, contains an admission on her part of the Defendant's right. It is true, she does not consent to assuming the office of sole manager, but there is an admission of the right, and accordingly the Defendant does enter into the sole management of the trust. Independently of the fact that the legal interest had devolved upon *George Taylor*, the elder, and *Alexander Taylor*, both of whom are now represented by the Defendant, had been themselves in a large sum, 20,000*l.* I think, which would be forfeited by the road being permitted to get out of repair, or by any violation of the contract; the assets of the party, therefore, were liable to be affected by any insurrection on the part of the persons, who had the charge of the road. This is a very material circumstance in the case, and when, in addition to these serious liabilities, I am told that there has been no fault found with the mode, in which the concern has been managed by the Defendant, but on the contrary, and further, bearing in mind that he has the legal interest, I cannot remove him from the management.

But there is no pretence for saying, that the Defendant is entitled to any salary. The case attempted to be made by the Defendant has been displaced by the evidence. To the authority of *Const v. Harris*(b), there is no dispute. But how does it bear upon the present case? There has been no constant usage in the management of this trust, no continued rule; but, on the contrary, a different rule appears to have prevailed at each different period; and

(a) The Reporters were unable to obtain a copy of this letter. (b) *Turn. & R.* 496.

in the year 1827 to the year 1836, it was not the trust that was paid, but one of the *cestui que trusts*, George Taylor the elder, which, consequently, must have been by arrangement for that particular case, and could not bind any one as a general agreement; and when George Taylor, the younger, succeeded, there is no proof that he had any salary; there is, therefore, no practice, no continued usage, nothing to lead the party entering upon the superintendence of the road to suppose that he was to have a salary. Again, it is contrary to the nature of the character of a trustee, that any person filling such an office should have a salary. No doubt, the present case is not one of an unmixed trust, there is a combination of trust and property; it is like the case of a mine, and stands upon a footing peculiar to itself. But when the party here entered into the management, he claimed a salary, without defining the amount. The Plaintiff appeared inclined to allow a small one; this he repudiated, and charged 300*l.* per annum. He might, by the same rule, insist upon 600*l.* This salary of 300*l.* the Plaintiff refuses to allow; she always protested against the amount, though it is true that she seemed disposed to admit the right to some small allowance. Then the case stands thus: the claim of the trustee is wrong, as far as he insists upon being allowed a salary for his trouble, but his right to the management of the road is clear, and rests upon higher grounds than the Plaintiff's claim, and therefore I cannot displace him. I shall disallow the payments that have been claimed, and against which the Plaintiff has protested; and I shall declare that the Defendant is not entitled to any salary. If the Defendant chooses to act, he must be content to do so without salary, and I shall give the Plaintiff liberty to apply from time to time, in case there should be any mismanagement, or that it

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should become necessary to appoint a Receiver or ~~ma-~~
nager.

Decree.

Declare the Defendant at liberty to conduct and manag^e
the road in the pleadings mentioned, subject to, and unde^r
the direction of this Court. Disallow to the Defendant any
salary except the sum of 50*l.*; and declare that the Defendaⁿ
is not entitled to any salary or compensation for his ser^v
vices in managing the said road for the past, save as afore^e
said; and that he is not entitled to any salary or compensaⁿ
tion for his services in managing the said road for the future :
and in case the Plaintiff shall be dissatisfied with the De^f
fendant's management, and find it necessary to have a maⁿ
nager appointed under this Court, let her be at liberty to
apply. And the parties waiving any account as to the pas^t
management, and the Plaintiff consenting to allow th^e
Defendant to charge as against the tolls at the rate of 100*l.*
a year for his expenses in such management, let the De^f
fendant pay to the Plaintiff the sum of 200*l.*, in discharg^e
of the balance of the sums retained by the said Defendaⁿ
in the said accounts heretofore rendered by him; and let
the Defendant pay to the said Plaintiff the said sum of
200*l.* within a month. No costs to either side up to this
hearing.

Reg. Lib. 87, fol. 381, 1843.

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April 29.

THE questions in this case arose upon the wills of *Bellew Kyan* and *Catherine Kyan*.

A testatrix bequeathed a sum of 300*l.* to her executors, in trust to place the same out at interest, and pay same, as it should fall due, to her nephew for life, and at his decease, "to divide the said sum, and any interest, which might be due thereon, among all his children equally; and if he should leave but one, then to give the whole to said one child." There were two children of the nephew, both of whom died in his lifetime :—

Held, that this was a gift to the father for life, with remainder to the children as tenants in common, with a gift over, in case there should be but one surviving child, to that child; and that

By the will of *Bellew Kyan*, which bore date the 14th of April, 1794, the testatrix, after giving certain directions with regard to her funeral, and the payment of her debts, bequeathed as follows: "I give and bequeath the remainder of my said property and personal estate, to my dear sister *Catherine*, for and during her natural life, and after her decease I hereby dispose of the same in manner following, to wit: I give and bequeath unto my nephew, *James Kyan*, should he be then living, the sum of 25*l.* sterling, and if he should be then dead, then I give and bequeath the same to his child or children (if more than one), as may be then living. I give and bequeath unto my executors, hereinafter named, the sum of 300*l.* sterling, in trust to place the same out at interest, but without risk to themselves, and pay the interest of the same, as it shall fall due, to my nephew, for and during his natural life; and after his death, to divide the said sum, and any interest that may be due thereon at his death, among all his children equally, and if he leave but one child, then to give the whole 300*l.* to said one child."

As that event had not happened, the representative of the deceased children was entitled to the fund.

In this case, a particular fund, which had been set apart during the life of the tenant for life to answer the bequest, having risen in value, the Court held, that there had been such an appropriation of that fund in payment of the legacy, as to entitle the party, to whom the legacy was now payable, to the benefit of the increase.

Where there is a gift to a class of persons, and an inquiry becomes necessary, to ascertain the persons entitled, the settled rule of the Court is to send it to the Master, in first instance, to inquire who are individuals constituting that class.

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The testatrix then bequeathed a number of pecuniary legacies to various persons, to be paid upon the decease of her sister *Catherine*, the tenant for life; and gave all the residue of her effects to the Rev. *William Tew* and Mr. *Paul Twigg*, and appointed these last-named persons to be her executors.

Catherine Kyan, the sister of the testatrix, on the same day made her will, in precisely the same terms as that already stated, except so far as that of substituting the name of her sister *Bellew Kyan* in the place of her own, as legatee of the entire property for her life; and she appointed the same persons, *William Tew* and *Paul Twigg*, to be her executors.

Bellew Kyan departed this life previous to the year 1800, leaving her sister *Catherine* her surviving; and the executors, *Tew* and *Twigg*, having renounced, administration with the will annexed was granted to *Catherine Kyan*.

In 1800, *Catherine Kyan* died, and her will was duly proved by the executors, *Tew* and *Twigg*. *James Kyan* was stated to have had two children only, both of whom survived the two testatrices, but died in the life-time of their father, who, upon their deaths, obtained letters of administration to be granted to him.

It appeared in the cause, that after the death of *Catherine Kyan*, the executors set apart seven Wide-street debentures of 100*l.* each (whether these debentures formed a portion of the assets of the testatrices, or whether they were purchased subsequently to their deaths, did not appear), in discharge of the two sums of 300*l.* bequeathed by the two

wills to *James Kyan* and his children, and subsequently paid the interest thereon to the said *James Kyan*, until the year 1825, when the said debentures were paid off; and the amount was thereupon invested by *Tew*, who was the surviving executor, in the purchase of 736*l.* 7*s.* 2*d.* Government old Three and a Half per Cent. Stock, the dividends upon which were regularly paid to *James Kyan* during his life by *Tew*, up to the period of his death, in 1830, and afterwards by his executrix, the Defendant, *Hester Tew*.

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In the year 1842, *James Kyan* died, having by his will bequeathed the residue of his property to the Plaintiffs, *Frederick Kimberly* and *Charlotte Kimberly*, and *Frederick Kimberly* having taken out administration *de bonis non* to the children of *James Kyan*, and also administration to *James Kyan* himself, the present bill was filed by the Plaintiffs, *Frederick Kimberly* and *Charlotte Kimberly*, his wife, against *Hester Tew*, the executrix of *William Tew*, seeking a transfer of the stock.

The Defendant by her answer alleged, that she was ignorant of the fact whether *James Kyan* had ever had any children, but insisted, that even assuming he had two children, as stated, that inasmuch as they had both died in his life-time, the legacies bequeathed to them by the wills of *Bellew Kyan* and *Catherine Kyan*, respectively, lapsed, and that consequently, one moiety of the said Government Stock passed, under the residuary clause in the will of *Catherine Kyan*, to the Defendant, who was the executrix of *William Tew*, the surviving executor and residuary legatee of *Catherine*; and that a moiety of the other moiety, which formed a portion of the undisposed assets of *Bellew Kyan*, belonged to her, as representing *Catherine*, who was one of

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the next of kin of *Bellew*, and as such entitled to the same, in equal shares with the said *James Kyan*.

The Defendant further insisted, that the surplus of the stock, over and above what would be purchased with 600*l.*, constituted part of the personal estate of *Catherine Kyan*; that *James Kyan* was only entitled to the interest on the said sum of 600*l.*, and that consequently he had been overpaid during his life-time; and that the Defendant ought now to be repaid out of any sum to which the Plaintiffs, or either of them, might be declared entitled, the amount so overpaid.

It was not proved what was the precise value of the debentures, at the period of the death of *Catherine Kyan*; but it appeared that in the year 1800, they were much below par, and would not, if sold at that time, have produced the sum of 600*l.*

Argument. Mr. Serjeant *Warren*, Mr. *Burroughs*, and Mr. *William O'Dell*, for the Plaintiffs.

The first question, which is raised in the present case, arises upon the construction of the wills of *Catherine and Bellew Kyan*. The Plaintiffs submit that the legacies bequeathed to the children of *James Kyan*, were vested and transmissible to their representatives, and that they, as such, are now entitled to them. Each child upon its birth acquired a vested interest, liable, no doubt, to be divested or displaced in part by the birth of any subsequent child: the whole scope of the will shews this. The *corpus* of the legacy is set apart by each testatrix from her general assets, and given to her executors in trust to pay the interest to the father, *James Kyan*, for his life: and after his death, to divide the said

sum " among all his children equally ; and if he leave but one child, then the whole to said one child." The gift is absolute. The vesting in possession, it is true, is postponed to the happening of a particular event, the fall of the life of *James Kyan*. But this does not operate to render the gift contingent, or to prevent the vesting in interest. In *Vize v. Stoney(a)*, where the doctrine of the vesting of legacies was much considered, a gift to a legatee, to be paid upon marriage, was held to be vested upon the death of the testator, from the circumstance of the testator having directed interest to be computed upon the legacy, and paid from the day of his decease. In that case, notwithstanding that the event, upon the happening of which the legacy became payable, was uncertain, your Lordship held the gift of the intermediate interest sufficient to render that vested, which otherwise would have been clearly contingent : and such, in the present case, ought to be the effect of the gift of the interest to the tenant for life, upon whose death the interest of the children was to vest in possession. It will be said, on the part of the Defendant, that the effect of the words, "if he leave but one child, then the whole to said one child," when taken in connexion with the former gift, is such as to render that gift contingent ; but, in the first place, the event has not happened ; and, secondly, even if it had, the only result would be to divest the estate, which was previously given, in favour of such only child. The Court will not control the effect of the former words by force of this clause, and thus work out a partial intestacy, contrary to its well established principles. Again, another and a necessary consequence of the Defendant's construction is, that if a child had died in the life-time of the father, leaving children, they

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(a) Ante, vol. ii. p. 337.

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would have been totally unprovided for : this is a consequence, which the Court always struggles to avoid and counteract, and, generally speaking, attains such an object by holding, in the first instance, the legacies to be vested. With respect to the second question, which has been raised on the part of the Defendant, that the fund is to be confined to so much of the stock as will produce 600*l.*, and that the Defendant is entitled to a set-off in respect of the over-payment made to *James Ryan*, it is to be remembered, that the investment upon the debentures, though at what precise period such took place is now uncertain, was, nevertheless, in compliance with the clear directions of the two testatrixes, to place out the sums in question at interest. At the time they were appropriated, in 1800, to pay the tenant for life, it is admitted they were in a state of depreciation, and would not have produced the sum, which they were set apart to answer : and the Defendant is not now entitled to derive any benefit from their accidentally having risen in value.

Mr. *William Brooke*, Mr. *Barlow*, and Mr. *J. H. Smith*,
for the Defendant.

The legacies in this case are plainly contingent. It is not alone the enjoyment that is postponed ; the direction to pay or divide the legacies is the only gift, and that gift or distribution is deferred until the death of *James Kyau*. Time was annexed to the substance of the gift ; and that gift could, therefore, only attach to such of the children as should be alive at the period of distribution. The concluding words clearly shew this : “ and if he leave but one child,” proving that the testatrix considered that the gift to the children was contingent upon their surviving their father. The case of

Edh v. Vaughan(a), before Sir *Joseph Jekyll*, appears to expressly in point. There a testator devised an annuity to trustees, in trust to pay the same to his sister for her life; and after her decease, to assign the same unto and for the use of all the children of his said sister, "equally to be divided amongst them, and if she should leave but one child, then that they should assign all to that one child." The Master of the Rolls held that the gift was contingent during the mother's life, and, as there was no child living at her death, that it lapsed. The principle, upon which the case appears to have been decided, was this: that as the testator plainly intended all the children to take as tenants in common, and yet if there was but one at her death, that that one should have all, there was no possible mode of rendering the will consistent in every part, except by making the bequest contingent during the life of the tenant for life. But in this way, the general intention of the testator was clearly effectuated. In *Spencer v. Bullock*(b), the testator bequeathed a legacy to trustees, in trust for his daughter for her life, the principal for her child or children after her decease, if more than one, share and share alike, and if but one, then the whole to such only child;" Lord *Granley* held that nothing vested in the children until the death of their mother; and he seems to have been principally influenced in coming to this conclusion, by the clause last referred to, giving the whole to a surviving child. He says, "the testator anxiously stipulates, that if there be only one child, it shall go to that one." In the present case, there are to be found words precisely similar: and if he leave but one child, then to give the whole to

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(a) Vin. Abr. tit. Devise (Z. c.) pl. (b) 2 Ves. 687.

1; 2 Eq. Ca. Abr. 554, pl. 16.

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said one child." The principle, therefore, of Lord *Albion* decision, in *Spencer v. Bullock*, ought to govern this. It is to be observed, that the legacy here is to the class, not *nominatim*, but as a class. This indicates an intention to benefit those only, who would constitute the class at the time of the distribution. In *Barber v. Barber*(a), the rule is laid down clearly by Lord *Cottenham*; "if a testator gives a legacy to be divided amongst the children of A., at a particular time, those who constitute the class at the time take." For these reasons, the Defendant submits that the legacies in the two wills lapsed, and that she is consequently entitled to one moiety of the stock, under the residuary clause in the will of *Catherine Kyan*, as representing the residuary legatee of *Catherine*; and to a moiety of the remaining moiety, as representing *Catherine*, one of the next of kin of *Bellew Kyan*. If, however, the Court should be disposed to concur in the view contended for by the Plaintiffs, still the Plaintiffs would be only entitled to so much of the stock as would produce 600*l.* The legacies were 600*l.* each: at what time the debentures were purchased cannot now be ascertained. *James Kyan*, it is true, was entitled to the full amount of the dividends: but this was an arrangement adopted for the convenience of all parties, and in consequence of the smallness of the surplus dividends, and could be held to amount to an appropriation of the

Mr. *E. Burroughs*, in reply.

The leaning of this Court is always in favour of the rights of interests; and it ever struggles to attain this object. In *Blamire v. Geldart*(b), a legacy, at the decease of a person who had a life interest in it, was held by Sir

(a) 3 Mylne & C. 688, 697.

(b) 16 Ves. 314.

Grant to be a vested interest, immediately upon the death of the testator, and not to be defeated by the death of the party in the life-time of the tenant for life. *Farmer v. Francis*(a) supports the same principle. In *Spencer v. Bullock*(b), which has been so much relied on, the contest was between the surviving children and the representatives of those who had died. The case was very peculiar in its circumstances, which seem to have somewhat coerced Lord *Alvanley* in the decision to which he came. The inclination of his mind evidently appears to have been in favour of holding the legacies vested. Here there is an express bequest of the principal sum to the executors, upon trust to pay the interest to the father for his life, and then to divide the principal at his decease among his children. There is no gift over, in the event of there being no child to take. The effect of this is, that the principal sum is of necessity severed from the bulk of the estate, and by such separation of the fund, the contingent nature of the bequest is at once destroyed. In *Vawdry v. Geddes*(c), Sir *John Leach* says, "where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately severed from the bulk of the property:" and, following out this principle, in *Saunders v. Vautier*(d), Lord *Cottenham* held, that under the bequest of a fund to trustees, to accumulate the dividends, until the legatee should attain the age of twenty-five years, and thereupon to transfer to him the principal, together with the accumulations, that such legatee acquired a vested interest in the legacy, and was entitled to a transfer upon his attaining the age of twenty-one years.

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(a) 2 Sim. & S. 505.

(c) 1 Russ. & M. 203, 208.

(b) 2 Ves. 687.

(d) Craig & P. 240.

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In addition to this, in the present case, there has been an actual severance of the fund from the residue of the estates by the appropriation of the debentures and the stock, which was subsequently purchased with their produce. In regard to the words in favour of a surviving child, they are not necessarily inconsistent with the preceding clause. But even if they were, the Court is bound to give full effect, if possible, to every part of a will, and should therefore, endeavour to make its provisions consistent, and is not at liberty, by conjecture or inference, from some of the words in a will, to limit the operation of other words, the meaning and effect of which, when taken by themselves, do not admit of any doubt; *Jennings v. Newmark*; *Thornhill v. Hall*(b). In this case, the intention will be effectuated, and every part of the will made consistent, holding that the legacies vested in all the children, as they came *in esse*, subject to be divested in favour of an surviving child.

Judgment.

THE LORD CHANCELLOR :—

According to the course of the Court, I must direct reference to the Master to inquire and report as to the issue of the family; whether there were any, and what child of *James Kyan*, the tenant for life of this legacy, alive at the period of the dates of the wills in question, and whether there were any born subsequently thereto; for if there be no doubt as to the parties entitled, I am not at liberty to determine the questions that have been discussed in the cause, until that is cleared up. If a fund be given to one for life

(a) 10 Sim. 223.

(b) 2 Clark & F. 22.

for his death to his children, and there is any dispute whether all the children are before the Court, the case must be referred to the Master to ascertain who they are. This is the settled rule of the Court, when there is a question before it, which a class of persons is interested. The Court does not take upon itself to determine who constitute that class, and sends the case, in the first instance, to the Master for his report(a).

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In the present case, though I am not at liberty to decide upon the questions that have been argued, yet it may be useful to state my present opinion, for the guidance of the parties. Upon the last point, I think there is no difficulty. There was clearly an appropriation of the fund, for the payment of the legacy. The consolidated sum, now in stock, appears to be a remnant of the estate, and no one could claim it adversely to the legatee, but the representative of the original testatrix. The debentures, when they were purchased, were at a depreciation. They subsequently rose in value, so that the sum produced by them, at the time they were paid off, amounted to more than the legacy. But as there was an appropriation of them to the payment of the legacy, and the legatees would have had to bear any loss, they are entitled, in my opinion, to the benefit of the increase in the value.

As to the gift, it is in these words: "I give and bequeath unto my executors, hereinafter named, the sum of 300*l.* sterling, in trust to place the same out at interest, but without any risk to themselves, and pay the interest of the same, as it shall fall due, to my nephew, for and during his

(a) *Baker v. Harwood*, 1 Hare, 327.

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natural life, and after his death to divide the said sum, and any interest that may be due thereon, at his death, among all his children equally ; and if he leave but one child, then to give the whole 300*l.* to said one child." And the bequest of the second sum of 300*l.* in the other will, is in precisely the same words. Now the contest, in the present case, is not between a surviving child and the representatives of deceased children. In all cases like this of gifts to children, the Court is anxious to give vested interests to children who have died in their parents' life-time ; for where a fund is left to a father for life, with remainder to his children, the children, looking to that fund as a future provision for their families, marry in the life-time of their father ; and the Court is unwilling that their children should be afterwards deprived of that provision by the accident of their death in their father's life-time.

In the cases upon settlements, I refer to the cases of *Woodcock v. The Duke of Dorset*(a), *Schenck v. Legh*(b), and the various other cases which have occurred upon the same subject down to the present time, the Court, in furtherance of this principle, has struggled to read the word "leave" "have." In those cases the contest was between surviving children and the representatives of deceased children ; and the Court has always leaned to that construction, which would give vested interests to the children, and thus let in all the class, for whom it must have been the intention of the parties to the settlement to provide. I agree that it is not the same in the case of a will, because the intention to provide for the issue, who die in the parent's life-time, is not so strongly manifested, as in the case of a

(a) 3 Bro. C. C. 569.

(b) 9 Ves. 300.

ment. But even there, the Court has struggled to vest interests to the children. No doubt, the case *With v. Vaughan*, cited from *Viner(a)*, is a strong authority, it is almost identical with the present case; but I cannot go along with the reasoning of the learned Judge, Sir *Joseph Jekyll*, who decided that case. He is a high authority, and I would not venture to differ from him without great hesitation. But still the case stands on its merits, and I do not remember to have ever heard it cited as authority. There the gift was of an annuity to trustees, in order to pay the same to the testator's sister, for her life, and after her decease, to assign the same unto and for the use of all the children of her said sister, equally to be divided amongst them, and if she should leave but one child, that they should assign all to that one child." There, the tenant for life died, without leaving any child living at her death, but having had only one child, who was an infant, and the decision was, that the gift lapsed; it never vested, but was contingent during the mother's life, and that the time of her death was the time when the children were to take. The reasoning of the learned Judge shewed clearly, that the testator intended the children, if more than one, to take as tenants in common, and if but one at her death, then that that one child should have all; "whereas," he adds, "if this were to vest in the children, that might be in the mother's life-time, then it would follow, that their shares would go to their representatives, in case they died before the mother, when yet, if there was but one living at the death of the mother, that child was to have the whole;" and then he says, "there is no other way to preserve a tenancy in common to all, and

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(a) Vin. Abr. tit. Devise (Z. c.) pl. 82.

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yet the whole to go to one only child, that should be the mother; and, therefore, as no child was to take, such as was living at the death of the mother, and in this case there was none, the remaining interest in the annuity was to be considered as undisposed of, and then to fall into the residue." Later Judges, however, have certainly not felt the same difficulty in executing what was to Sir *Joseph Jekyll* to be so full of difficulty; and they have laid down rules, which seem to shew that gifts to the children, if there should be several, and if but one should survive, to that only child, are perfectly consistent. The Court may give to all the children as tenants in common; and where there are several living at the period of the death of the father, that would be a clear execution of the very words of the will. Where then is the difficulty there be but one? Tenancy in common is then at an end and that one child must take the whole, divesting the previous gifts. It appears to me that the true construction of that the gift is to the father for life, with remainder to his children as tenants in common, if there should be several, but if the event should happen, and there should be but one child left, the previous gifts will be then divested and the only surviving child will take all. It is said, that this is not consistent with the previous gifts, and it may not be; but it is quite as consistent as to give in this case the whole over, where there is no express gift over. I apprehend that the law of the Court is, that where there is a gift to one for life, with remainder to his children, that is to all the children as a class. In the case in *Viner*, there never was but one child, and the case may have turned upon that fact.

I do not feel the difficulty which struck Lord *Alton*

Worcester v. Bullock(a). It appears to me, that it is more to say, that he was speaking of children living at his decease, than that he was referring to the death of the father for life, and that it is more consistent with the authorities. But I am quite warranted by law in construing the quest as I do. Putting the authorities out of the question, it appears to me, that the true construction of the will is, that it was a gift to the father for life, with remainder to the children as tenants in common, with a gift in case there should be but one surviving child, to the child. Then, as the event has not happened, the predeceased gifts are undisturbed, and the representative of the deceased children is entitled to the fund. If I shall be here when this case comes back, that is probably the day in which I shall decide it: at present I can only refer to the Master.

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O'DONNELL v. NOLAN.

Indenture of lease of the 12th of January, 1786, *Roger Philbin* demised unto *Peter O'Donnell* and *Thomas Philbin* certain lands and premises in the County of Mayo, to hold for the lives of *Peter O'Donnell*, *Anthony O'Donnell*, *William Philbin*, and the survivor of them, at the yearly rent of 55*l.* 18*s.* late Irish currency; and shortly after the execution of this lease, the lessees made a division of said premises between themselves, and from thenceforth continued to hold the said demised premises.

May 2.
Bill by the Plaintiffs to have a lease of the year 1786 (which had been originally granted for the term of three lives, one of which was stated to be still in existence), declared a subsisting lease, dismissed, in consequence of the Plaintiffs not having established their title to the lease.

A bill in the present case was filed by *Peter O'Donnell*.

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nell and William Philbin, and stated that the original lessees, *Peter O'Donnell* and *Thomas Philbin*, were both dead, and that the Plaintiffs were their respective heirs-at-law; that two of the lives in the said lease of January, 1786, had died; but that *William Philbin*, the third life, was still in existence, and was resident in North America, having left this kingdom in 1789.

The bill then set forth various transactions, in detail, between the Plaintiffs and the Defendant, *Peter Nolan*, who was an under-agent on the estate of Sir *William Henry Palmer*, the head landlord, the substance of which, as stated, was shortly as follows: that the Plaintiffs, upon the death of *Anthony O'Donnell*, in 1837, called upon the Defendant, *Peter Nolan*, to consult with him as to the most advisable course they should pursue, in order to prove the existence of the surviving life, *William Philbin*; that *Nolan* cautioned them against taking any step of the kind, alleging that they would thereby incur the suspicion of the landlord, and promised to use his influence to procure a new lease for them, on fair and reasonable terms; that subsequently the possession of the farm was demanded, on the part of the landlord, but refused by the Plaintiffs; that a distress was subsequently levied upon the said lands, and the Plaintiffs' cattle impounded; and that thereupon the Defendant, *Nolan*, undertook, upon the Plaintiffs giving up the formal possession of the lands, to restore them again to such possession, and to permit them to have the benefit of the lease of January, 1786, when they should be able to prove the existence of the said *William Philbin*; that the Plaintiffs accordingly, on that occasion, gave up the possession, and were forthwith let back into possession by the said Defendant, *Peter Nolan*, according to the arrangement.

The bill stated, that subsequently the Plaintiffs, on payment of their next gale of rent to *Nolan*, obtained a receipt from him for and on account of rent due to Sir *William Henry Palmer*, as they supposed; but that in reality, it turned out to be a receipt as for rent due to *Nolan* himself, who had actually obtained a lease of the property in question, and now insisted upon being paid an increased rent for the said farm; that the Plaintiffs afterwards declined to pay said rent, alleging that *William Philbin*, the surviving life tenant under the original lease, was still alive, and that the Defendant had assured them, that if they succeeded in establishing such fact, they would be allowed credit for such payments on the future gales of their rent.

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The bill then stated, that the Defendant, *Peter Nolan*, having again distrained for rent, the Plaintiffs caused a writ of replevin to be sued forth; and that the usual proceedings at law having been had, and the case, being at issue, came on to be tried at the Spring Assizes in and for the County of Mayo, when a verdict was found for the Defendant, *Peter Nolan*.

The bill then stated, that the Plaintiffs had dispatched two messengers to make inquiry as to the existence of *Philbin*, and that they had lately returned to this country, having seen and conversed with him in Pittsburgh, in the United States of America; that the Plaintiffs had informed the Defendant, *Nolan*, of the fact, but that he had refused to see the witnesses, and now claimed to hold the lands discharged of said lease.

The bill prayed, that the lease of the 12th of January, 1786, might be declared to be valid and subsisting; and

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the Plaintiffs decreed to hold the lands under and subject to the covenants in said lease; that an account might be taken of what was due by the Defendant, *Peter Nolan*, for rent received by him; and that what should be so found due to the Plaintiffs should be repaid to them; and that the Defendant, *Peter Nolan*, might be restrained from making up his judgment on the verdict so obtained by him in the replevin suit, and also from again distraining or taking any proceedings to compel payment of the aforesaid increased rent, or any part thereof, the Plaintiffs offering and being willing to pay the rent reserved by the lease of January, 1786.

The Defendant, *Peter Nolan*, by his answer alleged that, supposing the lease still to have any existence, the Plaintiffs were not the respective heirs-at-law of the original lessees; that, on the contrary, the heir-at-law of the lessee, *Peter O'Donnell*, was one *Anthony O'Donnell*, and that one *Richard Philbin* was the heir-at-law of *Thomas Philbin*.

There were several other defences set up by the Defendant in his answer, but as the case was decided upon this one, it has not been considered necessary to state them.

The Plaintiffs did not read any evidence in support of their title.

Judgment. THE LORD CHANCELLOR :—

I am very unwilling to allow a party to be turned round on a point of this nature, but I cannot avoid yielding to

the objection. In the year 1786, a lease of the property was granted to two persons of the name of *O'Donnell* and *Philbin*, for three lives. It was admitted that two of the lives were dead; but the third, *William Philbin*, it was said, was still alive, and resident in America. This was disputed by the Defendant, *Nolan*, who claims under a subsequent lease of these lands from the head landlord, and he alleged that the lease of 1786 had expired. The parties came to terms, and it is represented that it was agreed, that if *William Philbin* was still alive, the owners of the lease of 1786 should be restored to the possession. Subsequently, proceedings were taken, by distress, against the goods of the Plaintiffs, by the Defendant, *Nolan*, and he has obtained a judgment at law in the replevin suit. The object of the present bill is to have the lease of 1786 declared a subsisting one, and that the Defendant may be restrained from issuing execution on foot of that judgment.

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Judgment.

In order to shew a title to the lease of 1786, the Plaintiffs state that a division of the lands was made by the original lessees, and that they continued to hold the lands so divided up to the period of their respective deaths, and each of the co-Plaintiffs derives his title to his portion under his ancestor; but they have both failed in proving that they are the heirs of the respective lessees in the lease of 1786; their title is denied by the answer of the Defendant. The point, therefore, does not come upon them by surprise and the Defendant has shewn in proof who are the heirs. The Plaintiffs are suing upon a title, which has been displaced. This is not an objection of form, for the Plaintiffs are asserting the existence of the lease, in the absence of the parties really entitled. If the lease were to be set up in this suit, it could not be given to the Plaintiffs, for their title

1843. has been disproved, and it could not be awarded to parties
 O'DONNELL not before the Court.
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 Judgment.

There are many other difficulties. I could not have disposed of the case without an inquiry as to the existence of the surviving life; but this becomes unnecessary, and I dismiss the bill, but without costs, as I do not approve of the conduct of the Defendant.

Mr. *William Brooke*, and Mr. *Atkinson*, for the Plaintiffs.

Mr. *Monahan*, Mr. *Walter Bourke*, and Mr. *I. Blake*, for the Defendant, *Nolan*.

DUDGEON v. CORLEY.

April 28.
 Trustees in the same interest may be allowed the costs of separate answers, if the Master shall find that the circumstances justified separate answers.

IN this case, a question arose as to the costs of three trustees, named in the will of the testator, *Patrick Corley*, who, though in the same interest, had answered separately.

The LORD CHANCELLOR said, that circumstances might justify the Defendants in putting in separate answers, and he accordingly directed the Master, in taxing the costs, to allow to the Defendants, the trustees, the costs as of one answer only, unless he should find that any one had properly put in a separate answer, and then to allow his reasonable costs accordingly.

WALSH v. STUDDART.

1843.

May 3.

THE bill in this cause, which was filed by the Rev. *Richard Walsh* and *Wyndham Patterson*, as the executors of *Francis Patterson*, deceased, against the Defendant *Charles Studdart*, stated that *Francis Patterson* was entitled to a *all* real estate, situate in the County of Clare, and that *one* years previous to his death he had become acquainted with the Defendant, *Studdart*, who was a solicitor, carrying a business as such in partnership with one *Robert Wogan*, under the firm of *Wogan and Co.*; that *Patterson*, about the year 1824, employed *Studdart* as his land agent; and that his law business was conducted by the firm of *Wogan and Co.*, as it had been for several years previously to *Studdart* becoming a partner of the firm.

A., shortly before his death, stated to the Defendant, who was his solicitor and land agent, that he intended to make him a present of 300*l.*, and subsequently, being taken suddenly ill, he sent for the Defendant, and desired him to retain that sum out of the balance in his hands. There was no third person present on either of those occasions, and on the day following the last conversation *A.* died. Upon the death of *A.*, in 1831, the Defendant informed *A.*'s executors of the gift, and assisted them in making out an account of the testator's assets, in which account the 300*l.* was

created as a gift by the testator in his life-time, and in the inventory returned to the Ecclesiastical Court, and the account settled with the Stamp Office, a like credit was taken.

In 1832, the Defendant, at the request of one of the executors, furnished an account, in which, among other things, he stated all the circumstances under which he claimed to be entitled to this sum of 300*l.*, taking credit for it against the balance in his hands, and seeking to retain the residue of said balance, in discharge of certain costs due to him and his partner in a suit in the Exchequer, in which he had been employed for the testator in his life-time, and after his death for the executors, the amount of which costs, however, had not been ascertained. This account was retained by the executors without any objection. Upon a bill filed by the executors in 1839, against the Defendant, for an account of the sums due by him as agent to the estate of the testator:—

Held, that the gift of the 300*l.* could not be supported; that the executors had not confirmed said gift, and were not precluded by any acquiescence from disputing same.

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the Plaintiff, *Wyndham Patterson*, another third to one of his nieces, the wife of the Plaintiff, *Walsh*, and the remaining third to another niece, the wife of Mr. *James Otway*, and appointed the Plaintiffs *Walsh* and *Patterson* his executors, who accepted the office, and duly proved the will.

The bill charged that the Defendant, at the time of the death of *Patterson*, had in his hands a large sum of money, on account of the rents received by him, particularly from March and May, 1829, to the months of March and May, 1831, and for which he had never accounted, either with *Patterson*, or with the Plaintiffs, as his executors, since his decease; and it sought a general account of all rents received by *Studdart*, as agent of *Patterson*, since the time an account was last stated and settled between said parties, and of the payments and disbursements fairly made by, and allowable to, the said Defendant.

The Defendant, *Studdart*, by his answer stated, that from the period of his appointment, in 1824, he from time to time settled accounts with *Patterson*, which were regularly signed by the latter, and paid over the balances appearing in his hands; that at the time of his appointment to the agency, there was a very considerable arrear returned due by the tenants, but that this was altogether reduced at the time, when the last account was furnished, in March, 1831, which included the half year's rent due March and May, 1829; that the sum of 85*l.* 15*s.* 2½*d.*, the balance appearing upon that account, was paid at the time to *Patterson*, but that the account was not then signed by *Patterson*, in consequence of some illness, under which he was suffering at the time.

The Defendant by his answer stated, that *Patterson*, on the occasion of the last-mentioned settlement, in March, 1831, expressed great satisfaction with him, the Defendant, for the manner in which he had acted in the conduct of his agency, none of the rents having been returned as lost, and there being no arrear due by any tenant, and that as he, the Defendant, was shortly about to go to London upon some election petition, that he was anxious to shew the sense he entertained of his services, by making him a present of 300*l.*, to enable him to purchase a carriage, or something else of value, for his wife; that at the same time he desired the Defendant not to furnish any separate account for the year's rent of March and May, 1830, as the said sum of 300*l.* would more than absorb any balance that might be due thereon. The Defendant then stated that he was not obliged to go to London, and that subsequently, *Patterson* having been suddenly taken ill, on the 2nd of July, 1831, the day before his death, sent for Defendant, and again expressed his desire to give him said sum, and directed him to retain same out of the rents of the lands; that on leaving the bedroom in which said *Patterson* was, he stated both to his own brother, and to *Patterson's* housekeeper, who was much in his confidence, the directions given by *Patterson* in respect of said sum of 300*l.*, and requested of them to express to *Patterson* how grateful he felt for his kind recollections of his services, at a time when he was so very ill; that *Patterson* rapidly became worse, so that there was no opportunity of speaking again to him upon the subject, and that in the course of that night, or on the following morning, he died.

The Defendant by his answer denied, that there existed any open or unsettled account between him and the said *Francis Patterson*, at the period of his death, save as to the

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rents from March and May, 1829, to the corresponding months in the year 1831, and which rents he admitted to have been subsequently received by him. He stated that an account was prepared by him of the personal estate of the testator, to enable the executors to furnish the inventory, and make the necessary declaration preparatory to proving the testator's will; that the account was dated the 19th of July, 1831, and that the inventory, which was in accordance therewith, was, after close investigation of the said account, verified by the joint affidavit of the Plaintiffs; that the sum total of the rent returned for the two years ending March and May, 1831, after deducting head-rent and other outgoings, and agent's fees, amounted to 619*l.* 14*s.* 11*d.*, from which was deducted in said account the said sum of 300*l.*, and a further sum of 13*l.* 16*s.* 11*d.*, an allowance to a tenant; and that the balance of 305*l.* 18*s.* appearing upon the account, which was subsequently settled by the executors with the Stamp Office on or about the 2nd of August, 1831, was returned by the executors as the ascertained balance of rent due to the testator's personal estate at the time of his death.

The Defendant further stated, that in the month of May, 1832, he furnished to the Plaintiff, *Patterson*, at his request, an account of the rents received by him during the said two years ending March and May, 1831, and a specification of the several items of credit claimed as against said rents; that in said account the said credit of 300*l.* was claimed, upon the grounds which have been already stated; and that the balance was retained, to meet certain costs which had been incurred by the testator, *Patterson*, in his life-time, in a suit of *O'Reilly v. Patterson*, in the Court of Exchequer, and which were due to the Defendant and his partner; that this

It had been revived against the executors of *Patterson* after his decease, and that they had employed the Defendant and his partner as their solicitors in the said cause, which was still undetermined, and the costs in which had not been as yet taxed or ascertained. The Defendant stated that the Plaintiffs never raised any objection to the account of May, 1832, and that one of them, *Patterson*, in a letter of the 23rd of April, 1833, referring to said last-mentioned account, and inquiring when said costs would be furnished, concluded with these words: "if the costs be not ready to be furnished, I hope you will make no objection to paying the amount of the account furnished me in Dublin this time last year, and the bill of costs can be settled hereafter." The Defendant further stated, that it had been expressly agreed, that he should retain the balance of 305*l.* 18*s.*, towards the discharge of the costs in said cause, which were likely much to exceed the said balance. The Defendant submitted that there was a clear case of acquiescence on the part of the Plaintiffs, in the credit of 300*l.* claimed by the Defendant; and with regard to the balance of the account, the Defendant also relied upon the fact of the time, which had been permitted to elapse since the said balance was fully ascertained, and admitted, both in the accounts with the Defendant and with the Stamp Office.

Upon the coming in of this answer, the Plaintiffs filed an amended bill, disputing the right of the Defendant to the 300*l.*, so claimed as a gift from the testator, and insisting upon a further credit of 50*l.*, which sum had been sent in cash to the Defendant by *Patterson*, shortly before his death, and which latter fact had only recently come to the knowledge of the Plaintiffs; and they submitted that, regarding the characters filled by the Defendant, of agent

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and solicitor for the testator, they were not barred by the time which had elapsed from falsifying the account furnished in 1832, in relation to said two sums of 300*l.* and 50*l.*

The amended bill accordingly prayed that the Plaintiffs might be at liberty to falsify the account so furnished as aforesaid, especially as far as regarded the items of 300*l.* and 50*l.*, and that the Defendant might be decreed to pay the balance, the Plaintiffs offering to give credit for whatever costs might be found due to the Defendant when taxed and ascertained.

With respect to the item of 50*l.*, it appeared that it had been sent by the testator, in the year 1829, in reply to an application on the part of Mr. *Wogan*, for an advance on account of the costs in *O'Reilly v. Patterson*; that credit, however, was not given for this sum in that suit, but that it was applied in payment of an old bill of costs incurred in the year 1796, and upon which the following indorsement appeared, "Received from *Francis Patterson, Esq.*, on account of costs, 50*l.*"

Argument.

Mr. *James Dwyer*, in the absence of Mr. *Pigot*, stated the case on the part of the Plaintiffs.

Mr. Serjeant *Warren*, Mr. *Moore*, and Mr. *Keller*, for the Defendant.

The claim of the Plaintiffs is now substantially confined to the two items of 50*l.* and 300*l.* With regard to the first, the Defendant admits that it was paid by *Patterson*, but says *Patterson* or his estate has already got credit for it, by reason of this sum having been applied in discharge of a previously existing debt. The creditor was at perfect

liberty to appropriate this sum in any way he pleased, and he has accordingly set it off in payment of the earliest item in the account subsisting between him, or rather the firm, of which he is one, and the debtor. This sum of 50*l.* was sent to *Wogan*, and not to the Defendant, and it would be impossible, under these circumstances, in a suit constructed as the present is, and particularly in the absence of *Wogan*, to question the application of this sum. As to the 300*l.*, it was a perfectly valid gift to the Defendant by the testator, who seems to have been influenced by strong principles of affection and gratitude towards *Studdart*, for the care and prudence he displayed in the management of his property, and it was a gift which he had full power to make. It is true, it is impossible to give any direct evidence upon the subject, but there is no suggestion of any undue influence having been exercised by the Defendant over the testator, nor was there any concealment adopted, or other artifice, which the Court has usually fixed upon as indicative of unfair conduct. At the time, and when the transaction was recent, the Plaintiffs appear to have been perfectly satisfied with the truth of the statement put forward on the part of the Defendant, and to have acquiesced in the credit which he then claimed. Is it possible to conceive a clearer case of acquiescence than what is to be found in the present? In the first place, there is the account furnished to the Stamp-Office, verified by the oaths of the Plaintiffs, in which they state the balance due on account of the two years' rents to be only 305*l.* 18*s.*, thereby admitting, in the most unequivocal manner, the credit of 300*l.* claimed by the Defendant, and confirming the disposition already made by the testator. Then there is the letter of April, 1833, from the Plaintiff, *Patterson*, to the same effect. The case, therefore, does not depend upon the mere gift of the testa-

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tor, but upon a gift by a testator, subsequently confirmed and acted upon by the legal representatives of that testator, who were themselves beneficially entitled to a portion of his assets. In point of fact, the conduct of the executors amounts to a voluntary payment on their part, and that too with a full knowledge of all the facts; and such a payment has been repeatedly held to be good both at Law, *Brisbane v. Dacres*(a), and in Equity, *Goodman v. Sayers*(b). As a gift, therefore, it cannot be impeached. If the testator had the money at the time actually in his possession, and handed it over to the Defendant, and directed him to apply it in a particular manner, what right or authority would the executors have to gainsay such direction? What was done in the present case was equivalent to this. The money was in the hands of the Defendant, and the testator directed the Defendant to apply that money for his own purposes.

Mr. *Pigot*, in reply.

As to the sum of 50*l.*, it was sent by the testator, the client, in reply to an application on the part of the solicitor, for a sum of money to meet the expenses attendant upon the hearing of the cause of *O'Reilly v. Patterson*. It was specifically advanced towards the costs of that suit, and the Defendant or his partner were not warranted in applying it towards any other demand. With regard to the 300*l.*, the confidential relations, in which the Defendant stood towards the testator, altogether incapacitate him from availing himself of the transaction stated in the answer. He was the agent and attorney of the testator, and, filling such relations, he is bound to shew that he did not abuse the influence, which such relations exposed his client to; th

(a) 5 Taunt. 143.

(b) 2 Jac. & W. 249.

burthen of proof lies upon such a party clearly to establish that the transaction was fair and righteous, and that, whether it be a matter of contract, *Gibson v. Jeyes*(a), or of mere gift, *Hatch v. Hatch*(b), *Griffiths v. Robins*(c), *Hunter v. Atkins*(d). In *Hatch v. Hatch*, Lord Eldon states that "it is almost impossible, in the course of the connexion of guardian and ward, attorney and client, that a transaction should stand, purporting to be bounty for the execution of antecedent duty." *Watt v. Grove*(e) is to the same effect. In the present case, what evidence has been adduced to sustain the gift? It rests upon the simple answer of the Defendant himself; and from that answer, even assuming it to be in all respects correct, it appears that the transaction was conducted without the intervention of any third person, a circumstance which is clearly essential to the validity of the gift. In addition to all this, it is to be remembered, that when the conversation between the testator and the Defendant first took place, the testator was ill, and on the second occasion, when he is represented to have repeated his desire to give the Defendant the sum in question, he was *in extremis*, a fact of the most important character, and, if there was nothing more in the case, amply sufficient in itself to lead the Court to hesitate, before it supported such a gift. It is said, that the acts of the Plaintiffs, upon the death of the testator, amount to a confirmation of the gift; and their subsequent conduct is relied on as an acquiescence; but it is to be observed, that the Defendant continued to act as the solicitor of the Plaintiffs after the death of the testator; he prepared their answer in the revived cause of *O'Reilly v. Patterson*; he assisted them in winding up the very ac-

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(a) 6 Ves. 266.

(b) 9 Ves. 292.

(c) 3 Madd. 191.

(d) 3 Mylne & K. 113.

(e) 2 Sch. & L. 492.

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counts, which are now relied upon. Is it possible, that accounts prepared under these circumstances, could be held to confirm a transaction like the present? What would become of the general rule of the Court in cases of this nature, if it were to be frittered away by such an alleged confirmation? The very acts of confirmation now relied on were subject to the same ground of impeachment as the original gift itself, and, in the absence of any proof that the parties were fully aware of the invalidity of that original gift, must be utterly valueless and inoperative to support it. The case of *Consett v. Bell*(a), before Vice-Chancellor Knight Bruce, appears very closely to resemble the present. There, a party in his life-time executed an instrument, conveying all the effects which should, at the time of his decease, be in two specified rooms in his dwelling-house, to Mr. *Wilson*, and two years afterwards made his will, bequeathing his property, upon certain trusts therein mentioned. Upon the death of the testator, *Wilson* produced the deed of gift, and the executors, supposing that *Wilson* was entitled to the property in question, paid it over to him. Upon a bill filed by the parties entitled under the will of the testator, the Court refused to support the gift, and ordered *Wilson* to refund the property, notwithstanding the fact of payment by the executors, conceiving that the executors had acted hastily and improvidently, and through mistake, induced by the erroneous allegation of right on the part of *Wilson*. The present case is *a fortiori*: for here there is no deed, or in fact any evidence to sustain the transaction, and there is the confidential relationship between the parties, which does not appear to have existed in *Consett v. Bell*. No argument can be fairly drawn from the

(a) 1 Younge & C. C. C. 569.

lapse of time since the death of the testator. There was an unsettled account remaining open between the Plaintiffs, as executors, and the Defendant; and it was not until the settlement of that account, that the controversy as to the 300*l.* arose.

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THE LORD CHANCELLOR :—

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The questions in this case are, whether a sum of 300*l.* is to be allowed to the Defendant in his account with the Plaintiffs, and whether he is to give credit for a sum of 50*l.* against the costs due to him and his partner. These are the only matters in dispute between the parties, for, although the bill prays that the Plaintiffs may be at liberty to surcharge and falsify the accounts of the Defendant, yet as, in point of fact, there has been no account stated and settled between them, there can be no question as to surcharging or falsifying. An account must be directed. But the only items in dispute are these two sums of 300*l.* and 50*l.*

As to the item of 50*l.*, the case stands thus: the Defendant, *Studdart*, who was in partnership, as a solicitor, with a person of the name of *Wogan*, acted separately as the land agent of *Patterson*, and he and his partner *Wogan* were concerned, as solicitors, in a cause of *O'Reilly v. Patterson*, in which considerable costs had been incurred, and *Studdart* himself indeed seems to have acted as solicitor for *Patterson* in some old causes, in which it is said that the bills of costs were not paid. The 50*l.* was received under these circumstances. The cause of *O'Reilly v. Patterson* was about to be heard, and *Wogan* wrote to *Patterson*, saying, "the briefs are large, send me 40*l.* to pay the

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expenses of the hearing." *Patterson*, in reply, sent to *Studdart* a sum of 50*l*. It is admitted that that sum has not been credited to *Patterson* in his accounts with *Studdart*, but it is alleged that it was received for the particular account of *O'Reilly v. Patterson*, and that the receipt of it has been indorsed upon the bill of costs in that cause, and credit given for it accordingly in those costs. Now that would be a perfectly satisfactory answer, if it were proved, but it is altogether disproved by the evidence, for, on looking at the particular bill of costs, it is not indorsed upon that bill, but it appears upon the back of an old account of costs incurred as far back as the year 1796. So that credit has been given for it, not against the demand to which it was directed to be applied by the person who paid it, but against another demand, to which the solicitor had no right to appropriate it. It is, therefore, quite of course, that credit should be given for this sum as against those costs, in discharge of which it was paid.

The item of 300*l*. is very differently circumstanced, and involves great principles. *Studdart* was for some years the land-agent of *Patterson*, and seems to have conducted himself in the agency, in a manner calculated to give great satisfaction to his employer. At the period in question *Studdart* had a considerable balance in his hands. That balance was liable to be reduced to the extent of between 300*l*. and 400*l*., by the bills of costs due to *Studdart* and his partner *Wogan*, for, although *Studdart*, in his capacity of agent to *Patterson*, could have had no right to claim credit for costs due to him and *Wogan*, without a distinct agreement to that effect, yet it seems not to have been found fault with, and, therefore, I presume it was matter of arrangement, and consequently, to the extent of those costs, the debt due by *Studdart* to *Patterson* would

have been extinguished. But there would still be a considerable balance in the hands of *Studdart*. *Studdart* was about to go over to London upon some election business, and *Patterson* told him he would give him 300*l.* to buy a carriage for his wife. It happened that *Studdart* did not go to London, but he says that *Patterson* being taken ill, subsequently sent for him, and told him that he was so satisfied with his conduct, that he would allow him to retain the 300*l.*; and I have no doubt upon my mind, that in point of fact *Patterson* did say so. *Patterson* died in 1831, and after his death, in 1832, an account was delivered by *Studdart* to his executors, in which he does not claim to be entitled to this sum, as a matter of credit; but he states the facts very fairly, and in effect takes credit for it in the account. Now, let me ask on what ground, independently of acquiescence, could he be entitled to this sum? Could the claim have been maintained as between *Patterson* and *Studdart*? A sum of money is in the hands of an agent, who is himself a solicitor, and who held this money for the use of his client, and the client being *in extremis*, a conversation is said to have occurred between them, in which he directs his agent and solicitor to retain this sum. Suppose *Patterson* was alive, could the solicitor have claimed credit for it against him? In the first place, what proof is there that this conversation ever took place? Secondly, would this Court permit a solicitor, with money of his client in his hands, to come out of a room in which his client was,—least of all out of a sick room, where his client was lying at the point of death,—and where he was alone with him, and say that the client allowed him to retain for his own purposes a portion of a sum of money then in his hands? If so, there would be no safety in the ordinary dealings and transactions of life; and there is no class of the community upon whom it would press more heavily, than the

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solicitors themselves ; for, instead of families reposing confidence in them, as they now do, they would be obliged to deny them private access to their clients. But the law does not allow such transactions to stand. I consider the conversation between *Studdart* and *Patterson* as a mere communication of the intention of *Patterson* to make the gift, but that it was not binding in any manner upon him.

Then, what acts have taken place, since the death of *Patterson*, to make it binding upon his executors ? There are certain documents, relied on as shewing that the executors considered that this money had been properly retained by *Studdart*. But those documents were made out before the year 1832, when the account of *Studdart*, apprizing them of the nature of the transaction, was furnished ; and independently of that, I should be slow to hold that dealings by executors, with respect to the property of their testator, in the Ecclesiastical Court, in compliance with the provisions of a fiscal law, could give validity to transactions of this nature. In *Buckmaster v. Harrop*(a), payment of the auction duty was held not to be such a part performance as could take an agreement out of the Statute of Frauds, and enable the Court to decree a specific performance. Sir *William Grant* in that case said, “ that the revenue laws ought never to be held to operate, beyond their direct and immediate purpose, to affect the property, and vary the rights of the parties.” I cannot allow the necessity, which the executors were under, of paying the duty upon their testator’s assets, to operate as a confirmation of transactions with a third party, which are open to impeachment ; and I consider their right to object to this credit to be unaffected

(a) 7 Ves. 341 ; see *Tomkins v. Ashby*, 6 Barn. & C. 542.

by these documents. Then an account was rendered by *Studdart* to the executors, in which there was a statement of this transaction, which was perfectly fair, and I have no doubt that the transaction was an honest one on his part; and in that account, though he took credit in effect for this money, he did not claim it as a right. But if the transaction was not binding in 1832, as *Studdart* seems to have admitted by this account, how has it become binding since? The amount of the costs was not then ascertained, which might have been another reason why the executors did not then resist this claim: for, though they might not object to it, if the balance in *Studdart's* hands, after deducting that sum, would be sufficient to discharge the costs, yet they might very well resist the claim, if there was something to be paid by them in addition. Has any thing occurred since that time to deprive them of their right to object to this credit? If any change had taken place in the situation of parties, if any damage had been occasioned by the delay, so as to place one party in a worse position than the other, there might have been a good reason for not now allowing the executors to dispute this sum. But nothing of that kind has been shewn, and I am very clearly of opinion that *Studdart* had no right originally to retain this sum against his client, and that nothing has since occurred to give him any such right as against the executors. There must be a declaration, therefore, that *Studdart* is not entitled to the sum of 300*l*. I shall give no costs of the suit, because I believe the defence to be an honest one, and that the transaction was perfectly fair on the part of *Studdart*; and that, though there was nothing like acquiescence in point of law, there was enough to lead *Studdart* to believe, and I have no doubt that he did believe, that the executors intended to acquiesce in the donation.

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A decree stated, that a Defendant "waived all right of priority against the Plaintiff:"—
Held, that the Court could not, upon motion, restrict the force of such comprehensive words, notwithstanding that it was represented, that these words were introduced in relation to a particular right of priority only.

Sheehy v. Lord Muskerry (7 Clark & F. 1), observed upon.

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THE Plaintiff in this cause was *John Head Drought*, the executor of *John Armstrong Drought*, who had obtained two judgments against *Edward George Armstrong*, on Michaelmas, 1813, for the sum of 860*l.*, and the other in Hilary Term, in the following year, for the sum of 400*l.*, late Irish currency. *Edward George Armstrong* died in the year 1834, and the bill was filed for the purpose of raising the amount of the judgments so vested in the Plaintiff.

By the decree, which bore date the 9th of November, 1838, it was referred to the Master to take an account of the real and freehold estates of the said *Edward George Armstrong*, and also an account of the sums received by the Defendant, the Rev. *Cuthbert Fetherstone*, under a certain deed of the 11th of March, 1814, from the time of the filing of the bill; and also an account of the sum due to the Plaintiff, and of all the other debts of the said *Edward George Armstrong*.

Under this decree the Master made his report on the 2nd of June, 1840; and among other matters he found that *Cuthbert Fetherstone* was the assignee of three judgments affecting the estates of the said *Edward George Armstrong*, the earliest of which was obtained in Trinity Term, 1791, by *Thomas Langworth Dawes*, for the sum of 331*l.* 6*s.* 10*d.*; the next in Hilary Term, 1792, by *Anne Bacon*, for 713*l.* 6*s.*; and the third in Trinity Term, 1792, by *James Dickinson*, by 200*l.* That by a certain deed, bearing date the 18th of March, 1814, and made between *Edward George Armstrong* of the one part, and *Cuthbert Fether-*

one of the other part, reciting that *Fetherstone* had lent to *Armstrong* the sum of 2000*l.*, to pay certain debts due by him by judgment and otherwise, the precise amount of which was not then ascertained, *Armstrong* granted and conveyed unto *Fetherstone* certain lands therein mentioned, called the lands of Eryss, upon trust to receive the rents and profits thereof, and apply same in discharge of the head rent and renewal fines, and all costs, &c., to which he should be put in enforcing the payment of said rents: and then upon trust to receive an annuity of 500*l.* per annum, by two half-yearly payments, to be applied, in the first instance, to payment of 200*l.*, due by *Armstrong* to Messrs. *Reeves* and *Ormsby*, and then in payment of all interest, at the rate of six per cent. which should become due on foot of said sum of 2000*l.*; and after payment thereof, to form a fund, in manner therein mentioned, for liquidating the said principal sum, and the interest to accrue thereon, and to apply the surplus to the use of the said *Edward George Armstrong*, his heirs and assigns.

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The report found that the Defendant, *Fetherstone*, upon the execution of the said deed, entered into the receipt of the rents, and so continued until the appointment of the receiver in this cause; that he applied the rents in discharge of the head rents and other out-goings, payable out of said lands; but that no fund was ever created, pursuant to the trusts of the deed, for liquidating the principal sum, therein stated to be 2000*l.*, but which was actually only 1500*l.*

The Master, by his report, then found that by a certain other deed, bearing date the 1st of November, 1814, and made between the said *Edward George Armstrong*, and the Defendant, *Cuthbert Fetherstone* and *Edward Fetherstone*,

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of the first part, *Richard Reynell* of the second part, *Henry Gresson* of the third part, reciting that *Rid Reynell* had agreed to purchase an annuity of 100*l.*, charged upon said lands during the life of the said *Ed George Armstrong*; and that *Armstrong* had agreed to vail upon the said *Cuthbert Fetherstone* and *Edward Fetherstone* (in whom the legal estate in said lands was ve under a previous deed of the 29th of September, 1812 grant same to the said *Henry Gresson*, as trustee fo said *Richard Reynell*, “ with precedence as to payme said annuity, or yearly rent-charge of 100*l.*, and of the and trusts created by the said deeds of the 29th of Septen 1812, and the 18th of March, 1814;” and that the D dants, *Cuthbert Fetherstone* and *Edward Fetherstone*, agreed thereto; that by the said deed, *Armstrong*, with consent of *Cuthbert* and *Edward Fetherstone*, had gr to *Richard Reynell* an annuity of 100*l.* per annum, fo own life, charged upon the said lands of Eryss; and *Armstrong* and *Cuthbert* and *Edward Fetherstone* had ther granted and demised the said lands to the said *H Gresson*, for the term of 99 years, upon trust, in the place, to pay the head rents and renewal fines, the annuity of 100*l.*, by said deed granted to *Reynell*, lastly, subject to the expenses of the trust, according t trusts and for the uses declared in the deeds of the 29 September, 1812, and the 18th of March, 1814.

The report further found, that *Richard Reynell* di or about the year 1834, having appointed *Richard W Reynell* and *Thomas Barnes* his executors; that *Armst* also died in 1834; that at his death there was due, or count of the said annuity, the sum of 1016*l.* 17*s.* 11½*d.* that the executors were only entitled to recover a su

323l. 1s. 7d. on foot thereof, being three and a-half years of said annuity, which accrued due previously to the decease of *Armstrong*, and within six years next before the filing of the bill in this cause.

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To this report, an exception was taken, on the part of the executors of *Reynell*, who thereby insisted that they were entitled to be paid and to recover the entire sum of 1016l. 17s. 11½d., found by the report to remain unpaid on foot of the arrears of said annuity.

The cause having been set down to be heard upon the report and this exception, a final decree was pronounced on the 22nd of June, 1840, whereby the said exception was ordered to be allowed^(a), and the decree proceeded in these terms: "and the said Defendants, *Richard W. Reynell* and *Thomas Barnes*, waiving all right of priority against the Plaintiff, it is ordered that the report of *William Henn*, Esq., bearing date the 2nd of June, instant, as modified according to the order made on said exception, do stand confirmed." The decree then declared the several sums specified in the report to be well charged on the lands in the pleadings mentioned, and that same should be sold, and the produce thereof applied in payment of the several charges.

By an order, pronounced at the Rolls on the 22nd of November, 1841, His Honor granted an order of reference to the Master to report the priorities of the several creditors, and to allocate the funds produced by the sale of the lands. Under this order, the Master made his report, and thereby found that the sum standing to the credit of the cause

(a) 2 Ir. Eq. Rep. 303.

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to be allocated, was 1334*l.* 10*s.* 11*d.* Three and a Half per Cent. Stock; that the first three charges on the estate amounted to the sum of 207*l.* 10*s.* 5½*d.*; that there was due to the Defendant, *Cuthbert Fetherstone*, on foot of his judgment, the sum of 1344*l.* 19*s.* 9*d.*, and that same was the fourth charge in point of priority; that the Plaintiff's demand, on account of his judgment, and which the Master found to be the fifth charge, amounted to the sum of 1168*l.* 0*s.* 6*d.*, and that the sixth charge was that for the arrears of the annuity, due to the executors of *Reynell*, and amounted to the sum of 1016*l.* 17*s.* 11½*d.*

To this report, objections were taken both by the Plaintiff and the executors of *Reynell*; the former complaining that the charge of the Defendant, *Fetherstone*, ought not to have been reported in priority to his demand; and the latter, because they were reported *puisne* both to *Fetherstone* and the Plaintiff.

The case was heard at the Rolls on the 22nd of April, 1843, on which occasion, His Honor made an order directing the Master to review his report, and declared "that *Richard W. Reynell* and *Thomas Barnes*, as executors of *Richard Reynell*, deceased, were entitled to priority, as to the amount of their demand, over the sum reported due to the Rev. *Cuthbert Fetherstone*, on foot of the judgments in said report mentioned; and the said Defendants having by the decree waived all their priority in favour of the Plaintiff, that the Plaintiff was entitled to the amount of the sum reported due to the said executors of *Richard Reynell*, in priority over the said executors, and to stand in their place for payment to that amount out of the said sum so reported due to the said Rev. *Cuthbert Fetherstone*."

From this order, both the executors of *Reynell* and *Cuthbert Fetherstone* severally appealed.

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Mr. Moore and Mr. Cooke, for *Fetherstone*, submitted that the trusts of the deed of the 18th of March, 1814, were virtually at an end, in consequence of the proceedings in the present cause; that that deed operated to prevent *Fetherstone* from enforcing payment of the judgment, while he continued to act under the deed; but that this arrangement could only last so long as the trusts of that deed continued to be performed; that the effect of the deed of November, 1814, was merely to postpone the annuity of 500*l.* to the annuity of *Reynell*, and was not intended to confer any rights upon the Plaintiff; and that the Plaintiff's proceeding had, in fact, disturbed all the arrangements, in consequence of which the several parties were now remitted to their original rights.

The *Solicitor General* appeared for the Plaintiff; and Mr. *W. Brooke* and Mr. *Gresson* for the Defendants, *Reynell* and *Barnes*, the executors of *Reynell*.

The LORD CHANCELLOR, without calling on them, said that it was impossible for Mr. *Fetherstone* now to set up the claim of priority, which, by joining in the deed of November, 1814, he had agreed to postpone in favour of *Reynell*; and that by the decree of 1840, the executors of *Reynell* had expressly waived their priority over the Plaintiffs: that under such circumstances, the order at the Rolls appeared to be clearly right.

Mr. *William Brooke* and Mr. *Gresson* then proceeded to argue, upon the terms of the decree of the 22nd of June, 1840; that the words "waiving all right of priority against

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the Plaintiff" had been introduced to meet a claim of priority set up by the executors, as being the representatives of a purchaser for valuable consideration, without notice; *Wills v. Boddington*(a), *Blake v. Sir Edward Hungerford*(b); that in the present case, as there could be no rehearing, the decree having been enrolled, the Court would so construe the decree as to effectuate the intentions of all parties; and they cited, as authorities in support of the latter position, *Moore v. Blake*(c), *Sheehy v. Lord Muskerry*(d).

Judgment.

THE LORD CHANCELLOR:—

I cannot comply with the terms of this motion. By the decree, the party has consented to waive all right of priority, and I am asked upon motion to put a limited construction upon those words, which are as comprehensive as any well can be, and to say that all right of priority means only some particular right of priority. There is no doubt that whatever right Mr. Brooke's client had was derived from Mr. Moore's client, who had the first right, and communicated it to Mr. Brooke's client; and having that priority thus given to him, he deliberately waived it. Why, I cannot tell. I know not what might have been the arrangement between the parties: no motive is stated; no recital that, for any given reason, the right of priority is abandoned; but he deliberately, without saying why, waives all right of priority. I am told that the party never intended to waive the priority, which he now calls upon me to establish.

(a) 2 Vern. 599.

(b) Prec. in Chan. 158.

(c) 1 Moll. 281.

(d) 7 Clark & F. 1.

The case of *Sheehy v. Lord Muskerry*(a), which has been cited, forcibly illustrates the danger of acting upon the supposition of what was intended by the parties. Lord *Cottenham*, in delivering the judgment of the House of Lords in that case, argued that the proceedings in the cause shewed that the recital in the decree, to the effect that the Plaintiff had, by his counsel in open Court, waived insisting upon any relief in respect to the decree in the Court of Exchequer, must have been inserted from a misapprehension; he said, that the whole transaction proved that the Plaintiff's counsel could not have done what the decree recited; and the Lords acted upon this: and yet the fact is, that I myself openly dictated the order, in the presence of the counsel for all parties, who did not object, and the words were taken down at the moment by the Registrar, from my dictation; and it never was stated to me, that the declaration was not warranted by the fact. In the present case, there is a decree which I am asked upon motion to alter. I undertake no such duty. If the party has made a slip, and the argument of Mr. *Brooke* has led me to think that something may have been designed, which has not been expressed, I would relieve him if I could; but it is not in my power. He has, in the most express terms, waived all right of priority, and if he has been led into mistake, the decree having been enrolled, he must go to the House of Lords, where he may, perhaps, obtain a relief, which I have no power to grant.

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(a) 7 Clark & F. 1, 35.

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A. being entitled to the freehold lands of Blackacre and Whiteacre, in 1806 granted the former in mortgage, to secure an advance of 1000*l.*, and at the same time executed a collateral bond, upon which judgment was duly obtained, in Easter Term, 1806. This judgment was not revived until 1839, and was never re-docketed under the 9 Geo. IV. c. 35. In 1829, *A.* granted to *B.* an annuity of 400*l.*, charged upon Whiteacre, and in 1833 died, having

devised Whiteacre, subject to an annuity, to his wife, and all his other property to two trustees, upon trust to sell, and, after payment of his debts, to make an equal distribution thereof among his younger children. One of the trustees died in his life-time, and the other refused to act. In 1834, there being a considerable arrear of head-rent due upon Whiteacre, and the head landlord having brought an ejectment, *B.* paid off the arrear of rent, and the costs of the ejectment, and subsequently entered into a contract with the younger children for the purchase of Whiteacre, but died without having completed same; his widow and executrix, the principal Defendant, however, afterwards adopted the contract, and by a deed of the 29th of February, 1840, Whiteacre was conveyed by the younger children to the Defendant, *Abendum* to her, her heirs and assigns, free from all incumbrances, except three judgments, one of which was the judgment of 1000*l.* above mentioned, and the annuity of 400*l.* The covenant in the deed against incumbrances, however, was general. The surviving trustee of the will though named a party in the deed, never executed it. On a bill filed by the Plaintiff, who was entitled to the mortgage of 1806, and the judgment collateral, alleging that Blackacre was insufficient, and seeking to make good the deficiency, by means of the judgment, out of Whiteacre:—*Held*, that as the sale of Whiteacre was by the younger children, it was only the residue after payment of the debts that was sold, and that, consequently, the lands in the possession of the Defendant were, notwithstanding the provisions of the Statute 9 Geo. IV. c. 35, liable to the judgment.

Held, also, that the sum paid by *B.* in his life-time, in discharge of the arrears of head rent, could not be set up as a charge ranking in priority to the Plaintiff, but that same had in fact become extinguished in the inheritance.

BY indenture bearing date the 27th of July, 1795, and executed in contemplation of the marriage of *Henry Garnett* and *Alicia Cope*, reciting, that the said *Alicia Cope* was entitled, upon the death of her mother, to a sum of 1000*l.*, secured by a deed of mortgage of the 3rd of February, 1775, it was covenanted, that immediately upon the death of *Elizabeth Cope*, the said sum of 1000*l.* should be assigned to the trustees of the settlement (*Edmund R. Cope* and *St. George Ryder*), upon trust, to permit the said *Henry Garnett* to receive the interest for his life, and after his death, subject, together with certain lands, to the making good a jointure for the said *Alicia Cope*, in case she should survive her intended husband, upon trust for the eldest son of the marriage, upon his attaining the age of twenty-one years.

Shortly after the death of *Elizabeth Cope*, which occurred in the year 1805, this sum of 1000*l.* was paid to

Edmund R. Cope, the surviving trustee; and he lent this sum to *Henry Garnett*, upon the security of a mortgage of certain lands called Grange Trevitt and Black Hills, situate in the County of Meath, the former of which was held by *Garnett*, under a lease of the 14th of July, 1796, for three lives, with a covenant for the perpetual renewal thereof, and the latter under a lease of the 1st of November, 1803, for three lives; the mortgage deed bore date the 16th of May, 1806; and as a collateral security therewith, *Henry Garnett* executed to *Edmund R. Cope* a bond in the penal sum of 2000*l.*, with warrant of attorney for confessing judgment thereon; and in Easter Term, 1806, judgment was entered up against *Garnett*. This judgment was subsequently revived in 1839, but was never redocketed.

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Upon the death of his father, in 1820, *Henry Garnett* became entitled, *quasi* in fee, to the lands of Tymoole, which were held under a lease of the 18th of July, 1801, for three lives, with covenant for perpetual renewal; and having contracted with *William Jones Armstrong*, for the grant of an annuity, by deed of the 23rd of March, 1829, and made between the said *Henry Garnett*, of the first part, *William Jones Armstrong*, of the second part, and the Rev. *John Kerr*, of the third part, the said *Henry Garnett*, in consideration of the sum of 4000*l.* granted to *William Jones Armstrong*, his executors, administrators, and assigns, an annuity of 400*l.* charged upon the said lands of Tymoole, and certain other denominations, in which the said *Henry Garnett* had but a life estate, for the term of ninety-nine years, if the said *William Jones Armstrong*, *Thomas Knox Armstrong*, or *Archibald Kerr*, or any of them, should so long live; and by this deed the lands were demised to the said *John Kerr* for the term of 100 years, for the purpose

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of better securing the said annuity. By a subsequent deed of the 23rd of May, 1830, *William Jones Armstrong* declared himself to be a trustee of the annuity for *Thomas Knox Armstrong*.

In 1833, *Henry Garnett* died, and by his will, which bore date the 24th of August, 1826, he devised the lands of Tymoole, and the equity of redemption in the lands of Grange Trevitt, to *Robert Richards* and *Henry Cope Sweeny*, and the survivor of them, and the heirs of such survivor, upon trust to pay an annuity of 100*l.* per annum, out of the lands of Tymoole, to his widow *Alicia Garnett*, in addition to the jointure provided by the settlement of the 27th of July, 1795; and he directed the said trustees, as soon as possible after his decease, to sell his interest in the said property, subject to the said annuity; and also all other property, both real and personal, and after paying all his just debts, to make an equal distribution thereof amongst his younger children; and he directed that if any of them should die before attaining the age of twenty-one years, that the share of such child should go to the survivors; and he nominated the said trustees, *Robert Richards* and *Henry Cope Sweeny*, to be his executors. *Richards* died in the lifetime of the testator, and *Sweeny* refused to act.

The testator had been for some time previous to his death in embarrassed circumstances. The head-rent of the lands of Black Hills (which was comprised in the mortgage of 1806), had been permitted to fall into arrear, in consequence of which the interest in the lease, under which these lands were held, was evicted, in 1832, for non-payment of rent. At the time of the purchase of the annuity, in 1829, there was also a considerable sum due for head-rent out of the

lands of Tymoole. This, however, was discharged out of purchase-money for the annuity: but it appeared that rent was again suffered to fall into arrear; and in 1834, there being then two years and a half rent due out of these lands, and the head landlord having recovered in an ejectment for non-payment of rent, *Armstrong*, the annuitant, went forward and paid a sum of 862*l.* 10*s.* for rent and taxes, in order to redeem the same.

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In January, 1840, *Thomas Knox Armstrong* died, having by his will appointed, as his executrix, his widow, *Catherine Frances Armstrong*, the principal Defendant in the cause. It appeared that shortly before his death, he had entered into an arrangement with the widow and younger children of *Henry Garnett*, for the purchase of the lands of Tymoole; but the same not having been completed during his life, was, upon his decease, adopted by his widow, and carried into execution by a deed of the 29th of February, 1840. This deed was made between the younger children *Henry Garnett*, and the husbands of such of them as were daughters, of the first part; *Alicia Garnett* (widow of said *Henry Garnett*) of the second part; *Henry Cope Sweeny*, the surviving trustee in *Henry Garnett's* will, of the third part; and *Catherine Frances Armstrong*, of the fourth part; and after reciting, *inter alia*, the grant of the annuity of 100*l.* by the deed of the 23rd of March, 1829, the death of *Henry Garnett*, and his will, whereby, subject to the charges created by him, he gave and devised all his interest in the lands of Tymoole to his younger children, in equal shares, with benefit of survivorship: and after further reciting the death of *Thomas K. Armstrong*, and the agreement between him in his life-time and the younger children, for the purchase of said lands, at or for the price of 500*l.* sterling,

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subject to the said annuity so granted as aforesaid; and after reciting further the death of *Robert Richards*, one of the trustees named in the will of *Henry Garnett*, and that neither the said *Robert Richards*, nor the said *Henry Cope Sweeny* had accepted the trust, but wholly repudiated same, and that the said *Henry Cope* did still disclaim same, but, nevertheless, that he had, at the special instance and request of the parties beneficially interested, consented to join in making title by executing the said deed, it witnessed, that in performance of said agreement, and in consideration of 500*l.*, the parties thereto of the first and third parts, according to their several and respective interests, granted and released the said lands of Tymoole, unto the said *Catherine Frances Armstrong*, and her heirs and assigns, to hold for the lives of the several *cestuis que vie*, in the last renewal named and for the lives of such other persons as should for ever thereafter be added to the term granted by said original indenture of lease of the 18th of July, 1807, by virtue of the covenant for perpetual renewal therein contained, "freed and discharged of and from all charges, judgments, and incumbrances whatsoever, heretofore created by the said *Henry Garnett*, save and except a judgment obtained against the said *Henry Garnett*, in Her Majesty's Court of Queen's Bench, in Easter Term, 1806, in the penal sum of 2000*l.*, and also two other judgments obtained against the said *Henry Garnett* in the Court of Exchequer, for the sums of 66*l.* 15*s.* 9*d.*, and 45*l.* 9*s.* 9*d.*, and the hereinbefore recited annuity of the 23rd of March, 1829, and save and except the payment of the rent and performance of the covenants in said indenture of lease of the 18th of July, 1801, on the tenant or lessee's part, mentioned or contained." The deed contained a covenant, on the part of the younger children, with *Catherine F. Armstrong*, for quiet enjoyment by her of the

"lands " conveyed, free and clear, and freely and clearly, and absolutely discharged and exonerated, or by and at the expense of [the grantors of the first part], their heirs, executors, or administrators, effectually defended, protected, indemnified, and saved harmless, of, from, and against all former and other gifts, grants, bargains, sales, mortgages, judgments, estates, titles, troubles, charges, debts, liens, and incumbrances whatsoever, executed, committed, occasioned, or suffered by the said *Henry Garnett*," or by the said younger children, "or by *Alicia Garnett*, widow, or any of them, or by any person or persons claiming" by, under, or in trust for them, or any of them.

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The deed was not executed by the trustee, *Henry Cope Sweeny*.

The Plaintiff in the present cause was *Samuel Garnett*, the eldest son of *Henry Garnett*, claiming to be entitled to the sum of 1000*l.*, the subject of the settlement of 1795, and which had been lent to his father upon the security of the mortgage of the 16th of May, 1806, and alleging that the lands of Grange Trevitt (which alone remained, those of Black Hills having been evicted, as before stated), were a deficient security, he filed his bill on foot of the mortgage, and judgment collateral, for the purpose of having such deficiency made good out of the lands of Tymoole.

The bill prayed for an account, both on foot of the mortgage and judgment, and a sale of the lands of Grange Trevitt, and also of the lands of Tymoole, subject to the annuity of 400*l.*, charged thereon by the deed of the 23rd of March, 1829; and that what should remain due after the application of the produce of the lands of Grange Trevitt

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should be paid out of the monies to arise by the sale of the lands of Tymoole.

The Defendant, *Catherine Frances Armstrong*, by answer, admitted that her solicitor had notice of the Plaintiff's judgment previous to the year 1835, but stated that this judgment had never been redocketed, and was not revived until the year 1839, and that it was then revived, with notice to any of the parties entitled to the annuity; and insisted, that under the provisions of the 9 Geo. IV. c. 35, the said lands were not now liable to the payment of the judgment. The Defendant further alleged, that she, in character of executrix of her husband, *Thomas K. Armstrong*, was entitled to a lien upon the lands of Tymoole for the sum of 862*l.* 10*s.*, which had been paid by him in his life-time, in redemption of those very lands, when a writ of ejectment for non-payment of rent, in 1834; and she admitted that same was the first charge upon the said lands of Tymoole, and was payable thereout in preference to all other, save and except the accruing head-rents.

Argument.

Mr. Serjeant *Keatinge*, Mr. *Moore*, and Mr. *Francis* for the Plaintiff.

The defence in this case founded upon the Statute 9 Geo. IV. c. 35, and relied upon by the Defendant for the purpose of exempting the lands of Tymoole from the liability to the judgment, cannot be supported. It is true that the judgment has never been redocketed, but nevertheless the Defendant had notice, through her solicitor, of the existence of this judgment, and is therefore bound by analogy to the decisions upon the Registry Act(a),

(a) 6 Anne, c. 2.

establish the rule to be, that a party buying an estate, with notice of a prior incumbrance not registered, will yet be bound by such incumbrance. Supposing, however, that the Court should be of opinion, that notice will not avail

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Deprive a party of the benefit of the provisions of the 9 Geo. IV. c. 35, still the Defendant here is not entitled to set her case upon that Statute, inasmuch as she purchased expressly subject to the judgment. By the deed of February, 1840, the lands were conveyed freed and discharged and from all judgments, &c., "except a judgment obtained against the said *Henry Garnett*, in the Court of Queen's Bench, in Easter Term, 1806, in the penal sum of 2000," the very judgment now in question. The subsequent covenant against incumbrances, which is against all charges whatsoever, will, no doubt, be relied upon at the other side. But it is submitted, that this is not sufficient to control the effect of the express declaration contained in the *habendum*, a declaration which in fact amounts to a trust for the payment of this judgment. When once such a trust is created, the provisions of the 9 Geo. IV. c. 35, cease to have any application. In addition to this, it is to be remembered, that the judgment was revived in 1839, that this judgment of revival thus became an original judgment, *Crofts v. Hewson*(a), and as the Defendant purchased subsequently to such revival, she must consequently be held to be affected thereby.

Mr. Serjeant *Warren*, Mr. *Wm. Brooke*, and Mr. *Henry Ormsby*, for the Defendant, *Catherine F. Armstrong*.

The judgment in question never having been redocketed, pursuant to the provisions of the Statute 9 Geo. IV. c. 35,

(a) 5 Law Rec. N. S. 263.

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ceased to have any operation upon the lands in the hands of a purchaser for valuable consideration, such as the Defendant is. The Plaintiff says, in the first place, that the Defendant had notice of this judgment. But notice is not sufficient to deprive a purchaser of the benefit of the Statute. The language of the Statute is too strong to be thus displaced, and the object of the Act, which was to protect purchasers for valuable consideration, and to facilitate the transfer of estates, would be altogether counteracted, if the Act of Parliament would be in itself almost useless, if the doctrine of notice were to prevail. The general opinion of the Profession hitherto certainly has been, that notice is immaterial, and numberless titles have been accepted upon this almost universal impression. In *Knox v. Kelly*(a) in furtherance of the general policy of the Act, this Court held it to apply to a case of a purchase made several years before the Act passed; this was a strong case no doubt but it serves to shew the anxiety of the Court to apply the remedy which the Statute was intended to afford. It is urged, on the part of the Plaintiff, that the Defendant purchased, not only with notice of the judgment, but expressly subject to it; and the *habendum* of the deed is referred to for the purpose of shewing that a trust was thereby created, on the part of the Defendant, for payment of this judgment. But this argument is open to several satisfactory answers. In the first place this Court never presumes a trust, but in a case of absolute necessity. In *Cook v. Fountain*(b) this is stated to be 'general rule, to which there is no exception.' Here not only does there appear to be no such necessity, but the Court even called upon to presume the creation of the trust

(a) 1 Drury & W. 542; see (b) 3 Swanst. 585, 591.
Hickson v. Collis, 1 Jones & L. 94.

avour of a third person, who was no party to the deed, and whose name does not appear in the transaction. Supposing even that the contract between the grantors and the Defendant was, that the Defendant should indemnify the grantors against this judgment, it seems questionable whether the Plaintiff, who is a mere stranger, would be entitled to avail himself of such a contract, *Harrison v. Duignan*(a). The language of the clause in the deed, however, is not fairly open to the construction contended for : it means,—and the view now submitted to the Court, on the part of the Defendant, is corroborated by the frame of the covenant against incumbrances, which is general,—that the purchaser was to hold the lands subject to the judgment, if the lands were in reality subject to it. The Court will not construe this deed, so as to make that a charge upon the purchased lands, which, by the Statute Law of the land, had ceased to be a charge. In *Skeeles v. Shearly*(b) a somewhat similar question arose. In that case, the Plaintiff was a judgment creditor, and the Defendant was a mortgagee of the estate of the conusor, having notice of the existence of the Plaintiff's judgment. It was there, among other things, contended, that a trust had been created for payment of this judgment, and the case of *Thomas v. Pledwell*(c), was relied upon, where it was held that a party having notice of a judgment, though not docketed, was nevertheless bound to pay the judgment, Lord Macclesfield observing, that since the Plaintiff could not proceed at law against the Defendant, upon the judgment, for want of docketing in due time, he ought to be relieved in a Court of Equity ; nevertheless, in the principal case, it was held, first, by the Vice-Chancellor, Sir L.

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(a) Ante, vol. ii. p. 395.

(c) Vin. Abr. tit. Debtor and

(b) 8 Sim. 153 ; 3 Mylne & C. 112. Creditor (E.) pl. 5.

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Shadwell, and afterwards, upon appeal, by Lord *Cottenham*, that the judgment creditor had no claim against the purchaser, and the bill was dismissed. That case is expressly applicable to the present. If, however, the Court should be disposed to decide with the Plaintiff, the Defendant will be, at least, entitled to be paid out of these lands, in priority to the Plaintiff, the sums advanced by her husband in his lifetime to discharge the arrears of rent, and for the purpose of saving the lands from being evicted for non-payment of rent.

Judgment. THE LORD CHANCELLOR :—

In this case a sum of 1000*l.*, which formed the marriage portion of the wife of *Henry Garnett*, and was vested in trustees, upon trust for the eldest son of the marriage, subject to the life interest of the father, was lent to Mr. *Garnett* by the trustees, upon the security of a mortgage and judgment collateral ; the money was received by the father, and it constituted a debt of his at the period of his death, for which his assets are liable. Subsequently to this transaction, the lands of *Tymoole*, the estate now sought to be affected by this judgment, became vested in *Henry Garnett* absolutely ; and he, in the year 1829, conveyed them to secure an annuity of 400*l.* to Mr. *Armstrong* ; and by his will he devised them, of course subject to that annuity, and subject also to an annuity which he gave by the will to his widow, to trustees, upon trust for the payment of his debts ; and, subject to that trust, he gave the residue to his younger children. These lands of *Tymoole* were afterwards sold, but not by the trustees ; because, although one of them was a party to the conveyance by which the fee was conveyed to the purchaser, he did not execute the deed, and it is recited on the face of the deed, that neither of the trustees had

accepted the trusts, but that they had both disclaimed ; the sale, therefore, was by the *cestui que trusts* alone ; that is, by the younger children.

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The deed of conveyance was made between the younger children of *Henry Garnett*, of the first part ; his widow, of the second part ; the surviving trustee of his will, of the third part ; and the Defendant, *Catherine F. Armstrong*, of the fourth part. It recited the annuity of 400*l.*, and the will of *Henry Garnett* ; that a contract had been entered into by the younger children of *Garnett*, for the sale of the estate to Mr. *Armstrong* (who is now represented by the Defendant), subject to the annuity, for a sum of 500*l.*, and the death of *Armstrong* ; the younger children then convey the estate, free from all incumbrances, except two judgments, which are not the subject of discussion here, and the judgment now in question, by which the 1000*l.* was secured. It is truly said, that there is no recital that the estate was to be sold, subject to this judgment ; on the contrary, the agreement for the sale, as recited, is for a conveyance, subject only to the annuity ; and the covenants for title are against all incumbrances whatsoever, not excepting this judgment.

The Plaintiff, the owner of the mortgage and judgment, has filed the present bill, seeking to raise out of the lands conveyed to the Defendant, *Armstrong*, so much of the judgment as the lands comprised in the mortgage shall be found insufficient to cover. This judgment, not having been revived or redocketed within five years after the passing of *Moore's Act*(a), was void both at Law and in Equity

(a) 9 Geo. IV. c. 35.

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against the purchaser. That I do not understand to be disputed; but the Plaintiff's case is, that the purchase was made expressly subject to this judgment. On the part of the Defendant, it is insisted, first, that the Plaintiff is not entitled to come in under the conveyance, as an incumbrancer, whose security, though void at law, is saved by the express terms of the deed, for though, in the conveyance, the estate is stated to be subject to this judgment, yet it was not intended to make the estate liable to the judgment: that the covenant against incumbrances is general, and contains no exception in favour of this judgment, and therefore there is no contract respecting it; but that if, in consequence of the form of the conveyance, it should be held, upon the true construction of the deed, that there was a contract on the part of the Defendant, to pay this judgment, yet the authorities are against the right of the Plaintiff to enforce the payment in the present mode of proceeding. Secondly, it has been insisted that the Defendant is a purchaser for value, and that though there was notice of this judgment, yet that is immaterial, because the Statute renders the judgment actually void against the purchaser, as it was not revived or redocketed within the proper time.

With regard to the first point, the case stands thus: here is an existing debt, secured by a judgment; that judgment has been revived within twenty years, and is therefore good against the debtor and his assets, though, as against the purchaser, it has been rendered void by the provisions of *Moore's Act*. As a judgment, therefore, it did not bind the estate in the hands of the purchaser, but the seller has thought proper to convey the estate, subject to it. It appears to me, that the true construction of the contract is, that the debt was to be paid; and that, as between the pur-

chaser and the judgment creditor, the estate was to be subject to it; but that the seller agreed to indemnify the purchaser, and to throw it on the other assets of the testator, though, in the first instance, the purchase was to be subject to the claims of the judgment creditor.

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The case of *Thomas v. Pledwell*(a), cited from *Viner*, takes up the second point thus. The judgment there did not affect the purchaser, but he had notice of it, and an allowance was made for it in the purchase money. Lord *Macclesfield* said, "it is plain the Defendant had notice of the judgment, and did not pay the value of the estate, and that is a strong presumption of an agreement to pay off the judgment, and since the Plaintiff cannot proceed at Law against the land upon the judgment, for want of docketing in due time, he ought to be relieved in a Court of Equity;" and he decreed the Defendant to pay the money *bona fide* due upon the judgment. I am not aware of any authority against this. I do not consider the case of *Skeeles v. Shearly*(b) as opposed to it. There, by the operation of a deed of appointment, the judgment was overreached, and had ceased to be any lien on the lands; but it was said, that a sum of 1000*l.* was retained to pay off the judgment, and, therefore, the mortgagee took, subject to it. But what was the real contract? It was to vest the estate in the purchaser, discharged from the claim of every body. The parties meant to exclude the judgment creditor; but as they were not sure that the law would enable them to do so, they left 1000*l.* to pay off the judgment, if it were a lien, but only in that event, and so far from creating a trust for the judg-

(a) Vin. Abr. tit. Creditor and Debtor (E.) pl. 5.

(b) 8 Sim. 153; 3 Mylne & C. 112.

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 —
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ment creditor, or giving him any lien against the estate, they meant to exclude him, and to retain the money. When the case came before Lord *Cottenham*, he said, "as to the second point, if the Plaintiff has no lien upon the estate created by the appointment, the alleged notice is immaterial; but it seems to have been supposed, by the bill, that a species of trust was created in the Plaintiff's favour as to the 1000*l.* For this there is no pretence. The Plaintiff was no party to the transaction, and the whole 4500*l.* is proved to have been paid by *Shearly*, 3500*l.* to the prior mortgagees, and 1000*l.* to the solicitor of *Cook*. It is quite immaterial, whether it was the object of borrowing the sum, that the Plaintiff's debt should be paid with it. There was nothing in the transaction to give him a lien upon the property, in preference to the mortgage of *Shearly*."

Now *Cook* was the mortgagor, and his solicitor was not the solicitor of the mortgagee; when, therefore, the 1000*l.* was paid to him, the whole money had come to the right hand, and the evidence shewed that the amount intended to be advanced, had been paid to the prior incumbrancer and the mortgagor; even in the hands of the mortgagor, it would be liable to indemnify the mortgagee, in the event of the judgment creditor establishing his demand. That authority does not appear to me to touch this case. I am disposed to say, that if the case here was, that there was an existing debt, which could bind the estate, not strictly as a judgment, but as a debt, and that the agreement between the parties was, that the purchaser should take the estate subject to it, there would be no doubt the purchaser would be obliged to fulfil his obligation, and to pay the amount of the judgment, although the judgment might be barred as a judgment. If the parties thought fit to say, this

art of the assets on which the debt is to be thrown, purchaser, being a party, would be bound. I am, relieved from deciding that point in this case, for a point, which the counsel for the Defendant, though argued the case very ably, wisely refrained from touching it is this. The property was devised to trustees, trust to sell and to pay the debts of the testator, and divide the residue among the younger children. The younger children alone, without the trustees, sold, and of what they sold nothing but the residue, that is, the estate subject to the debts. Now this judgment is one of the provisions provided for by the trust, and therefore it is an incumbrance on the property, which none of them had the power of displacing. I have looked at the conveyance to which the will was recited, and I find that the trust in which to sell and pay the debts is not recited; but the will recites that *Henry Garnett* died about the 23rd of March 1833, that previously thereto he made his will, by which he, subject to the charges created by him, devised an interest in the lands of Tymoole to his younger children, in equal shares, with benefit of survivorship. That is the recital. But if the parties had stated the facts fully, it would have appeared on the face of the conveyance that they had no title. It appears to me that the result is quite of course.

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There is still another point. The Defendant says, that the plaintiff is entitled to a sum of money, which was paid by *Armstrong* in his life-time in discharge of head-rent, and that the plaintiff is not entitled to deprive her of the benefit of the payment, although the Court should construe the deed in favour to her, as recognizing the judgment. This is not argued by the counsel for the Defendant, who has

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spoken last, but I apprehend that the law is otherwise. =
 The cases upon the subject, particularly the case of *Parr,* =
v. Wright(a), decide that if one buy an estate, upon which =
 he has an incumbrance, and do not keep the incumbrance =
 on foot, a *puisne* incumbrance will be let in at his expense =
 and he will lose the benefit of his prior incumbrance. =
 and be considered as the owner of the estate, subject to the =
puisne incumbrance. I apprehend that the right to this =
 payment cannot now be set up against the Plaintiff, but =
 that it has become extinguished in the inheritance. It =
 appears to me that the decree is almost a matter of course.

(a) 1 Sim. & S. 369; 5 Russ. 142.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

PEED *v.* CUSSEN.

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May 8, 11.

BY indenture of lease, bearing date the 9th of June, 1707, *Richard Lord Viscount Shannon* demised the lands of *Ballingarry, Ballyhenson, and Ballyfeard*, all situate in the county of Cork, to *George Howse*, for the term of three lives, with a covenant for the perpetual renewal thereof, at the yearly rent of 20*l.* 10*s.*, late Irish currency, and a renewal fine of 10*l.*

By the decree in this cause, the Plaintiff's right, under a settlement of the year 1804, to two-thirds of certain lands, was established, subject to the leases subsisting at the time of the settlement. *A.*, a third party, claiming a portion of these lands as a purchaser for valuable considera-

By indenture of the 9th of July, 1716, *George Howse* granted and released the said lands to *John Coveney* for the term of years, and without notice, under a lease made in the year 1831, by one of the Defendants, *C.*, who was entitled to the remaining one-third, applied after the decree, and upon undertaking to be bound by all the proceedings in the cause, he obtained an order, upon consent, that the Master should inquire and report, whether he was entitled to any estate or interest in the lands in the decree mentioned:—*Held*, that under this order, he could not set up his claim under the lease of 1831 against the Plaintiff, whose title had been established by the decree, and that he was not entitled to have the order varied or discharged, to enable him so to do.

The Court cannot relieve against a decree or order made upon consent, unless in case of misrepresentation.

A decree cannot be varied upon motion, without consent.

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term of the same three lives, with a like covenant for perpetual renewal, and a similar renewal fine, but at the yearly rent of 60*l.* late Irish currency.

John Coveney died seised of these lands, intestate, leaving *Daniel Coveney*, his eldest son and heir-at-law; who then upon having become possessed of them, by certain articles of agreement, bearing date the 2nd of January, 1716, demised to one *Joseph Coveney*, 146 acres of the lands of Ballyhenson, being a portion of the lands comprised in the original lease, for the term of 199 years, at the yearly rent of 30*l.*

The interest of *John Coveney* under the lease of July, 1716, having become subsequently vested, as to two-thirds, in *Edward Peed*, the father of the Plaintiff, and the remaining one-third in *Ellen Cussen*, the wife of *Patrick Cussen*, by deed of the 19th of January, 1804, being the settlement executed on the occasion of the marriage of said *Edward Peed* with *Mabella Catherine Waterhouse*, the two-thirds so belonging to *Edward Peed* were settled to the use of the settlor, *Edward Peed*, for life, with remainder to the children of the marriage, in such shares as *Edward Peed* should appoint by deed or will, and in default of appointment share and share alike.

The lives in the lease of 1716 having expired, *Patrick* and *Ellen Cussen*, claiming to be entitled to the entire interest in that lease, obtained a renewal thereof, bearing date the 13th of December, 1813, from *Stephen Henry Waring Howse*, in whom the interest of *George Howse* was then vested.

Patrick and *Ellen Cussen* having thus acquired possession of the entire property, treated it, in point of fact, as their own; and by indenture of mortgage of the 29th of September, 1831, made between the said *Patrick Cussen* and *Ellen* his wife of the one part, and *Thomas Tangney* of the other part, after reciting the renewal of December, 1813: that *Patrick Cussen* had agreed to execute to *Edward Coveney*—in whom the interest under the lease of January, 1735, was then vested—a lease of certain portions of the lands of *Ballyhenson*, for the term of 200 years, at the yearly rent of 16*l.* 10*s.* 4*d.*; that to enable them to make such lease, they were anxious to obtain a renewal of the original lease of 1716, and then to borrow a sum of 400*l.* from the said *Thomas Tangney*, upon mortgage of said lands; and apply the annual rent of 16*l.* 10*s.* 4*d.*, in keeping up a policy upon the life of the said *Ellen Cussen*, for the sum of 400*l.*; and for the purposes aforesaid to levy a fine: it was by the said deed witnessed that the said *Patrick Cussen* and *Ellen* his wife, granted all the lands comprised in the original lease of 1716, to *Thomas Tangney*, subject to the said lease so agreed to be made to *Coveney*, and to the intended mortgage for said sum of 400*l.*; and it was further agreed that *Thomas Tangney* should, with all convenient speed, procure a renewal of the lease the 9th of July, 1716, to be executed to him; and that such renewal, when obtained, should enure to the several trusts thereinbefore declared with respect to the premises thereby conveyed.

On the 31st of October, 1831, the renewal was obtained by *Tangney*; and by deed of the 5th of November, 1831, *Patrick Cussen* and *Ellen* his wife, with the consent of *Thomas Tangney*, demised to *Edward Coveney*, for the term of 200 years, all that part of the said lands of *Bally-*

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henson, containing 162 acres, or thereabouts, at the rent of 16*l.* 10*s.* 4*d.* By a subsequent deed of the 31st of March, 1832, and made between *Edward Coveney* and *Robert Coveney* his brother, of the first part, several other persons of the second, third, and fourth parts, and *Luke Shea* of the fifth part, reciting the lease of the 5th of November, 1831, the lands therein comprised were assigned by way of mortgage to the said *Luke Shea*, for securing the sum of 700*l.*, with interest; and by deed of the 28th of July, 1834, the equity of redemption in the said lands was purchased for the sum of 958*l.* by *Luke Joseph Shea*, in trust for his father the said *Luke Shea*.

In the month of July, 1825, *Edward Peed* died, without having exercised the power of appointment contained in the settlement of 1804, leaving the Plaintiff, *James Peed*, and one daughter, his only children, him surviving. In the month of July, 1835, the original bill in the present cause was filed by *James Peed* against *Patrick Cussen* and *Ellen* his wife, and *Tangney*; and in the year 1836 it was amended, by making the Plaintiff's mother and sister and the trustees of the settlement of 1804, parties Defendants and it prayed that the renewals of the lands, which had been obtained, should be declared to have been taken upon the trusts of the settlement of 1804, and that the rights of the several parties should be ascertained, and for a partition.

On the 24th of November, 1838, a decretal order was pronounced in the cause, establishing the rights of the parties claiming under the settlement of 1804. The cause having been subsequently set down to be reheard, upon the petition of *Patrick Cussen* and *Ellen* his wife, upon the 10th of May, 1839, it was among other things declared

that the Plaintiff and his mother and sister were entitled to two undivided thirds of the said lands, "according to the limitations of the settlement of the 19th of January, 1804, subject to the several leases then legally and properly affecting the same, of which the terms are still unexpired." And it was further declared, that the Defendant, *Thomas Tangney*, being a mortgagee without notice of the Plaintiff's right, has, and he was thereby declared to have a lien on the whole of the premises comprised in the indenture of the 31st of October, 1831, for the sum due to him on foot thereof, for principal, interest, and costs. And it was further ordered, that the Plaintiff should be entitled to recover, out of the said one undivided third part, all such sums as he should pay to the said Defendant, *Tangney*, on foot of his demand; and that the Defendant, *Tangney*, should have his costs against the Plaintiff, and that the Plaintiff should have the same over against Defendants, *Cussen* and wife, and against the said one undivided third part of the said lands.

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After the pronouncing of this decree, Mr. *Luke Joseph Shea* applied at the Rolls for liberty to go before the Master in the cause, to be examined *pro interesse suo* with respect to his right, title, and interest, under the deeds of the 31st of March, 1832, and the 28th of July, 1834. This motion was grounded upon an affidavit of Mr. *Luke Joseph Shea*, in which he detailed the foregoing facts: that his father, Mr. *Luke Shea*, had died in the year 1835, and that he was his only son and personal representative; that it was true he had been named as a party Defendant in the suit, and charged to be out of the jurisdiction; but that he had been, since the institution of the suit, frequently and for a considerable time within the jurisdiction, and was never served with any process: that at the time of the execution of the

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said deed of the 28th of July, 1834, he had not notice, nor had his father, to his knowledge, information, or belief, at the times of the execution of the mortgage or purchase deed respectively, or either of them, any notice whatsoever of the right or title of the Plaintiff in the suit: and he submitted that he was and is, as his father's trustee and personal representative, to be considered a purchaser for valuable consideration, without notice of the demands and claims of the parties now seeking to affect, or derogate from, the lease of the 5th of November, 1831, and that he was entitled to the benefit of the said lease for the residue of the said term of 200 years, subject only to the rent of 16*l.* 10*s.* 4*d.*

This motion came on to be heard upon the 28th of June, 1841, when the following order was pronounced: "It is ordered by, &c., Mr. *Shea* consenting, and Mr. *Bulla*, solicitor for the Defendants, not objecting thereto, that the Plaintiff be at liberty to amend the bill in this cause, by making *Luke Joseph Shea* a party Defendant; Mr. *Shea* consenting to be bound by the decree of the 10th of May, 1839, and by the proofs made in the cause, and by all the proceedings therein, as fully and effectually as if he had been a Defendant from the commencement: and such consent having been given, it is further ordered that *John S. Townsend*, Esq., the Master in this cause, do inquire and report whether the said *Luke Joseph Shea* is entitled to any estate or interest in any and which of the lands in the decree mentioned, under the deeds and documents mentioned in the said notice of motion."

Under this order a charge was filed on the part of Mr. *Shea*, stating the above facts, and insisting that neither he,

nor his father had, at the time of the execution of the mortgage of the 31st of March, 1832, any notice of any title inconsistent with the right of the said *Patrick Cussen*, and ~~Ellen~~ his wife, to grant said lease of the 5th of November, 1831: that under the decree of the 10th of May, 1839, the rights of the Defendant, *Thomas Tangney*, deriving title under the fine and the deed of September, 1831, as a purchaser for valuable consideration, without notice, had been protected: and that his rights under the deeds of the 31st of March, 1832, and the 28th of July, 1834, were entitled to similar protection: that the Plaintiff admitted his right to 146 acres, being the portion thereof comprised in the articles of the 2nd of January, 1735, for the residue of the term of 199 years therein comprised, at the yearly rent of 30*l.*; but he insisted that he was in fact entitled to the whole of the said 162 acres for the said term of 200 years, and at the rent of 16*l.* 10*s.* 4*d.*: but that if the Master should be of opinion that his title only extended to the lesser quantity, and at the increased rent, then that he was entitled to have compensation made to him in respect of such deficiency of lands, and such excess of rent, out of any sums, which should be found to be due to *Cussen* and wife in the said cause.

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In proceeding before the Master, it was contended by the Plaintiff's counsel that he was precluded by the terms of the decree in the cause from considering whether the said *Luke Joseph Shea* had any estate or interest in the lands mentioned in his charge, beyond what existed at the time of the execution of the settlement of 1804.

Mr. *Shea* thereupon applied at the Rolls that the said order might be varied, by directing the Master to inquire

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and report whether the said *Luke J. Shea* was entitled to any and what estate or interest in the lands in said order mentioned, notwithstanding the declarations contained in the decree in the cause of the rights of the Plaintiff under the settlement of 1804, subject only to the leases then subsisting; or that said order might be wholly set aside and rescinded; and that the said *Luke Joseph Shea's* name, which was added as a Defendant in this cause under said order, might be struck out as such Defendant, upon the terms of the said *Luke Joseph Shea* paying such costs as had been or might be rendered nugatory by the rescinding said order. The motion came on to be heard at the Rolls, on the 16th of February, 1843, when His Honor was pleased to refuse the application with costs. From this order Mr. *Shea* now appealed.

Argument.

Mr. *William Brooke* and Mr. *J. J. Murphy*, for the Appellant.

The Appellant here is a purchaser for valuable consideration without notice, and stands in circumstances precisely similar to the Defendant *Tangney*, and ought, therefore, to be treated as favourably, and to be declared entitled to the same relief and lien that the Defendant *Tangney* is. The cases of *Moore v. Blake*(a), and *Sheehy v. Lord Muskerry*(b), are in point to prove that the Court will construe a decree so as to carry out and effectuate the intentions of the parties, and the justice of the case. It will be said here that the order of June, 1841, was one made upon consent, and cannot therefore be varied. The cases of *Butter v. Ommaney*(c), and *Wood v. Griffith*(d), shew that the

(a) 1 Moll. 281.

(b) 7 Clark & F. 1.

(c) Tamlyn, 344.

(d) 1 Mer. 35, 38.

Court can relieve even against an order made upon consent.

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Argument.

Mr. Serjeant *Warren* and Mr. *T. White*, for the Plaintiff.

In June, 1841, when the order, which is now sought to be varied, was pronounced, His Honor was of opinion that the order, which Mr. *Shea* then asked for, could not be granted : he offered Mr. *Shea* the alternative of dismissing his application, or taking the order in question. Mr. *Shea* on that occasion consented to take this order. He proceeded to act upon it in the office ; and now finding that it has not proved as beneficial as he expected, he seeks to be relieved from it. It is, however, well established that a decree upon consent will not be varied ; *Harrison v. Rumsey(a)*, *Wall v. Bushby(b)* : *a fortiori*, when it is sought to vary that decree upon motion, *Willis v. Parkinson(c)*, *Brackenbury v. Brackenbury(d)*. In the present case, the right of Mr. *Shea*, as a purchaser for valuable consideration without notice, appears to be most doubtful. But even if it was clearer than it is, as a party intervening in the suit, he must submit to be bound by the proceedings, *White v. Hall(e)*, *Banister v. Way(f)*. *Butter v. Ommaney(g)*, which has been relied upon on the part of the Appellant, was a case of misrepresentation.

THE LORD CHANCELLOR :—

May 11.

This is an application to reverse an order of His Honor, upon a motion made before him to review an order made

Judgment.

(a) 2 Ves. Sen. 488.

(e) 1 Russ. & M. 332.

(b) 1 Bro. C. C. 484.

(f) 2 Dick. 686.

(c) 3 Swanst. 233.

(g) Tamlyn, 344.

(d) 2 Jac. & W. 391.

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by the late Master of the Rolls, under the following circumstances.

By a decree pronounced in the cause upon a re-hearing, the rights of the Plaintiff were declared to extend to two-thirds of a certain portion of property, comprised in an original lease of the year 1716. This lease had been renewed by the Defendants *Cussen* and wife, who were the owners of the remaining one-third. A person of the name of *Tangney* obtained, under *Cussen* and wife, a title as mortgagee of the whole estate, and he obtained the legal estate; for the last renewal, which was executed in the month of October, 1831, was made to *Tangney*. In the suit, *Tangney* established his title as a purchaser for valuable consideration, without notice of the Plaintiff's rights; and accordingly the form of the decree was, that the Plaintiff was declared entitled to two-thirds, subject to such leases as were subsisting at a particular period: and the title of the mortgagee, as a purchaser for valuable consideration, having been established, a remedy was given by the decree to the Plaintiff over against the *Cussens* (who had improperly mortgaged the two-thirds, which did not belong to them), so as to bind their one-third.

Mr. *Shea* claimed under an under-lease of the year 1735, which came within the description of leases by the decree declared to be binding upon the title of the Plaintiff, and *Shea's* right to that extent is not now disputed. He was not a party in the suit. A receiver was appointed over the whole estate; and the receiver finding *Shea* in possession of more land than was comprised in the lease of 1735, at a less rent than was reserved by that lease, sought to make him or his tenants responsible. He, on the other hand, claimed the additional land, and the benefit of the reduced rent, under a new lease,

made in 1831, by the *Cussens*, subsequently to the renewal.

This difference being one which could not be decided by the receiver, Mr. *Shea* made a motion, praying to be examined *pro interesse suo*; and that it might be referred to the Master, to report his title to the lands, and at what rent, and for what term. He supported his application by an affidavit, in which he stated that he never had any notice of the Plaintiff's title, and that, to the best of his belief, his father was a purchaser for valuable consideration, and without notice. Upon Mr. *Shea* consenting to be bound by the decree and the evidence in the cause, just as if he had been a party in the suit from the commencement, the Master of the Rolls referred it to the Master to inquire and report "whether the said *Luke Joseph Shea* was entitled to any estate or interest in any and which of the lands in the decree mentioned, under the deeds and documents mentioned in the notice."

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Now the cases, which have been cited in the course of the argument, and especially the case of *Banister v. Way*(a), shew that, by consent, a person, who is not a party to the suit, may be allowed to come in and prove his demand, without disturbing the decree, although, generally speaking, the Court cannot, without consent, add to or vary a decree upon motion. *Butter v. Ommaney*(b) shews that an order made upon consent may be varied, if it was made upon a misrepresentation; but the general rule is, that the Court cannot relieve against any order or decree made upon consent. As this cause originally stood upon the order at the Rolls, the Plaintiff was entitled to the benefit of the decree, and Mr. *Shea* subjected himself to all the rights

(a) 2 Dick. 686.

(b) Tamlyn, 344.

1843. given by that decree to the Plaintiff; and, subject to those
 FREED rights, came in to be examined *pro interesse suo*. He
 v. had a claim consistent with the decree, which he might
 CUSSEN. have established under that order, because he had a sub-
 Judgment. sisting claim under the lease of 1735, which was within
 the description of the leases, subject to which the Plaintiff's
 rights were declared. I do not think that it can be said,
 that he was misled. If there was a mistake, it was occa-
 sioned by his own inadvertence; he knew his own rights,
 and chose to take the order in this form. Such an order as
 he asked for could not have been made without consent, for
 the order would have given him rights as a purchaser for
 valuable consideration without notice, and thus have set
 him above the Plaintiff, and to that extent have reversed
 the decree: but he got all that he was entitled to, and
 abandoned the rest of his motion. How can I say that
 there has been any miscarriage or mistake, such as would
 now justify the Court in interfering? If there had been a
 clear mistake, or misapprehension of rights, although I
 could not correct the decree on motion, yet as this order
 was made upon motion, I might, by motion, discharge or
 vary it.

When Mr. *Shea* went before the Master, he did not dis-
 cover his mistake; but he filed his charge, and set up the
 claim which I have stated, and concluded by charging
 that if he should not be able to establish his case against
 the Plaintiff, he was at least entitled to compensation
 against the *Cussens*. So that he appears to have had the
 alternative in his contemplation. But there could be no
 remedy over against the *Cussens* under this order, although
 perhaps he might establish this claim in another suit. He

now says, that although this order was made on his own application and consent, it will not suit his purpose, and he seeks to have it discharged. I must hold parties bound by what they have done with their eyes open. If Mr. *Shea* be a purchaser for valuable consideration, without notice, he may perhaps have relief in another suit against the *Cussens*: but in this suit the title of the Plaintiff is clear, and has been established by the decree. Looking at the connexion of this party with the *Cussens*, I do not regard the claim with much favour. I see no grounds for relieving Mr. *Shea* from the order, and I refuse the motion, with costs.

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 Judgment.

WALCOTT v. BLOOMFIELD.

BY indenture of settlement, bearing date the 9th of May, 1789, and made between Sir *John Caldwell* of the first part, *Harriet Meynell* of the second part, *John Roper* and *Frances Saunderson* of the third part, *Edward Miller* and

1843.
 May 8, 11.
 By a marriage settlement of the 9th of May, 1789, certain real estates, the property of the husband, were limited in trust for him

for life, and after his decease to trustees, for a term of 1000 years, and subject thereto, to the use of the first and other sons of the marriage, with remainder to the husband in fee. The trusts of the term, which were for raising a sum of 8000*l.* as portions for the younger children of the marriage, were declared to take effect in case there should be one or more child or children of the said marriage, besides an eldest or only son.

There was no son of the said marriage, but only two daughters. Upon the occasion of the marriage of one of the daughters, the father covenanted to settle upon herself and her husband, and their issue, an annuity of 500*l.* per annum, and subsequently conveyed, in fulfilment of this covenant, a portion of the lands which were the subject of the settlement of 1789, to trustees for a term of 300 years, to secure same. Upon the marriage of the second daughter, the father made a pecuniary provision for her, which was expressly declared to be in satisfaction of her portion under the settlement. The father, by his will, devised the estates, which were the subject of the settlement of 1789, to his two daughters, in the same manner as they would have come to them if he had died intestate:—

Held, upon the true construction of the settlement, that as there was no son of the marriage, the portions were not raisable.

Semble, that even if the portions were raisable, the gift of the annuity to the daughter would have operated as a satisfaction of her share.

Semble, that after the descent of the estates upon the two daughters, neither could support a claim against her sister's lands for her share of the portion.

The case of *Church v. Edwards* (2 Bro. C. C. 180) approved of.

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Charles R. Dashwood of the fourth part, and *Sir John Hort* and *Sir John Coghill* of the fifth part, being the settlement executed on the occasion of the marriage of *Sir John Caldwell* with *Harriet Meynell*, certain lands situate in the county of Fermanagh, being the estates of which the said *Sir John Caldwell* was seised in fee, were limited to trustees for a term of 99 years, to secure an annuity of 200*l.* per annum for the lady, during the life of her intended husband, for her sole and separate use, and subject thereto, in trust for *Sir John Caldwell* for life; and after his decease, to the use of *Sir John Hort* and *Sir John Coghill* for a term of 1000 years, and, subject therein, to the use of the first and every other son of the marriage in tail male, with remainder to *Sir John Caldwell* in fee.

The trusts of the term of 1000 years were declared as follows :

“ And as to, for, and concerning the said term of 1000 years hereinbefore limited to the said *Sir John Hort* and *Sir John Coghill*, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed by and between all the parties to these presents, that the same is so limited to them upon the several trusts, to and for the several intents and purposes, and under and subject to the several provisoes and agreements hereinafter mentioned, expressed, and declared of and concerning the same ; that is to say, that in case there shall be one or more child or children of the said *Sir John Caldwell* on the body of the said *Harriet Meynell*, his intended wife, to be begotten, besides an eldest or only son, then upon trust that they, the said *Sir John Hort* and *Sir John Coghill*, and the survivor of them, or the executors or administrators of such survivor,

shall and do, either in the life-time of the said Sir *John Caldwell*, with his consent testified in writing under his hand, or else not till after his decease, by demise, sale, or mortgage of the said towns, manors, lands, tenements, hereditaments, and premises, or of a competent part thereof, for all or any part of the said term of 1000 years therein, or by such other ways or means as they, or the survivor of them, his executors or administrators, shall think fit, raise and levy, or borrow and take up at interest, the sum of 8000*l.* of lawful money of Ireland, for the portion and portions of all and every such child or children, not being an eldest or only son, as aforesaid, the same to be paid in manner following, that is to say, if but one such child, being a daughter, then the said whole sum to be paid to her; but in case such only younger child shall happen to be a son, then it is hereby declared that the sum of 5000*l.* only shall be raised, levied, and paid to him; and if two or more such children, then the said sum of 8000*l.* shall be shared and divided between or amongst them, in such parts and proportions as the said Sir *John Caldwell*, by any writing or writings under his hand and seal, attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature of or purporting to be his last will and testament, to be by him signed and published, in the presence of and attested by the like number of credible witnesses, shall order, direct, or appoint; and in default of such order, direction, and appointment, then the said sum of 8000*l.* shall be equally divided amongst them, share and share alike; the said portion or portions of such child or children to be paid in manner following, that is to say, to such of them, as shall be a son or sons, at the age of twenty one years, and to such of them, as shall be a daughter or daughters, at the

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age of twenty-one years, or day or days of marriage, which shall first happen, if such respective times of payment happen after the decease of the said Sir *John Caldwell*; but if in his life-time, then within six calendar months next after his decease, and not before or sooner, unless by his express consent, testified as aforesaid. Provided always that in case any of the said children, being a son or sons, shall happen to die before the age of twenty-one years, or being a daughter or daughters, shall happen to die before the age of twenty-one years or marriage, the portion or portions of such of them so dying shall go and be paid unto the survivors or survivor of them, subject to such direction or appointment of him, the said Sir *John Caldwell*, as aforesaid; but in default thereof shall be equally divided amongst such survivors or survivor, share and share alike, when the original portion or portions of such surviving child or children shall become payable as aforesaid; provided, nevertheless, that in case all the said children shall happen to die before such their respective age or marriage as aforesaid, or in case all, any, or either of them shall misbehave themselves, himself, or herself, towards the said Sir *John Caldwell*, to be testified and made known to them, the said Sir *John Hort* and Sir *John Coghill*, or the survivor of them, or the executors or administrators of such survivor, in and by writing under his hand and seal, then and in such case the said monies so to be raised for their said portions as aforesaid, or so much thereof as shall not then be raised, shall not be raised, but shall cease for the benefit of the person or persons next in reversion or remainder of the premises, and so much thereof as shall be then raised shall be paid to the same person or persons in reversion or remainder as aforesaid. Provided also, and it is hereby further declared, that it shall and may be lawful to and for the said Sir *John Caldwell*, in

~~case~~ the said intended marriage shall take effect, and there shall be issue thereof more or besides an eldest or only son, ~~by~~ any deed in writing, or by his last will and testament in writing, executed in the presence of two or more credible witnesses, to charge and make liable all the said hereditaments and premises with the payment unto such younger children or child of the sum of 2000*l.* Irish money, in such parts and proportions, and to vest and be paid at such times as the said Sir John Caldwell shall by such deed or will appoint; and upon this further trust that they, the said Sir John Hort and Sir John Coghill, or the survivor of them, or the executors or administrators of such survivor, shall and do, by and out of the rents, issues, and profits of the said hereditaments and premises, raise, levy, and pay such yearly sum and sums of money for the maintenance and education of such child or children, not being an eldest or only son, as aforesaid, in the mean time, from and after the decease of the said Sir John Caldwell, and until the said portions shall become payable respectively, as aforesaid, as to them, the said Sir John Hort and Sir John Coghill, or the survivor of them, or the executors or administrators of such survivor, shall seem meet, such yearly maintenance, not exceeding the interest of their respective portions, after the rate of six per cent. per annum, Irish money."

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The proviso for cesser of the term was as follows: "Provided also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case there shall be no such child or children of the said Sir John Caldwell, on the body of the said Harriett Maynell, his intended wife, to be begotten, other than an eldest or only son as aforesaid, or, there being such child or children, all of them shall happen to die before such their

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respective age or marriage, or in case the same sum and sums of money before limited and appointed to be paid for their portion and portions, as aforesaid, and all such maintenance, in the mean time, and until the same portion or portions shall become payable as aforesaid, shall, by the said Sir *John Hort* and Sir *John Coghill*, &c., be paid and levied by the ways and means in that behalf herein before mentioned, or shall be by such persons as shall, at the time being be next in reversion or remainder of the premises expectant upon the said term of 1000 years, paid or to the good liking of the said Sir *John Hort* and Sir *John Coghill*, &c., secured to be paid according to the purport, true intent, and meaning of the presents, and in every or any of the said cases, and at all times from henceforth, the said term of 1000 years ended in the premises, or so much thereof as then shall remain unsold and undisposed of, for the purposes aforesaid, shall cease, determine, and be utterly void, to all intents and purposes whatsoever, anything contained to the contrary in anywise notwithstanding."

The settlement also contained the following provision: provided also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Sir *John Caldwell* shall happen to survive the said *Harriett Meynell*, his intended wife, and there shall be no child or children, male or female, between them begotten, or being such, all of them shall happen to die in the life-time of the said Sir *John Caldwell*, before any of them attain the age of twenty-one years, or be married, then and in such case, and not otherwise, it shall and may be lawful to and for the said Sir *John Caldwell*, by any writing or writings under his hand and seal attested, &c., to assign, limit, or appoint any such other or further part

or parts of the said lands, &c. to and for such woman whom he shall marry after the decease of the said *Harriett Meynell*, for her jointure ; and then also, and in such case, and not otherwise, it shall be lawful for the said Sir *John Caldwell*, by such writing, &c., to charge all and every or any of the said lands with the payment of any such sum of money, as he shall think fit, not exceeding 4000*l.*, for the portion or fortune of the daughters or sons which he shall hereafter happen to have by any such other woman, as he shall marry after the decease of the said *Harriett Meynell* ; and also with the payment of such yearly sum as he shall think fit for the maintenance and education of such daughters and younger sons.

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Immediately after the execution of this settlement, the intended marriage was solemnized. There was issue thereof two daughters only, *Frances Arabella*, and *Louisa Georgina*. Lady *Caldwell* died in 1794, leaving these two daughters her surviving.

In 1817, *Frances Arabella Caldwell* intermarried with *John Colpoys Bloomfield*, and certain articles were executed previously to the marriage. This deed bore date the 19th of May, 1817, and was made between *John Colpoys Bloomfield*, of the first part ; *Frances Arabella Caldwell*, of the second part ; Sir *John Caldwell*, of the third part ; and Sir *Benjamin Bloomfield* and *Robert Johnston*, of the fourth part ; and after reciting that upon the treaty for the said intended marriage, it was agreed that the said Sir *John Caldwell* should pay and secure to the said *John Colpoys Bloomfield* and *Frances Arabella Caldwell*, an annuity of 500*l.* ; and that the said *John Colpoys Bloomfield* should covenant to settle any estate or property, which

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he should at any time thereafter become entitled to in right of his said intended wife, upon the issue of the said marriage; the said deed witnessed, that the said Sir John Caldwell covenanted with the said Sir Benjamin Bloomfield and Robert Johnston, to pay the said annuity of 500*l.* per annum to the said John Colpoys Bloomfield for his wife, and, after his decease, to the said Frances Arabella Caldwell for her life, in case she should happen to survive the said John Colpoys Bloomfield; and after her decease, to pay the same for the use and benefit of the issue of the marriage, in equal shares and proportions, among the younger children: and further, that he would, after the solemnization of the said marriage, by good and sufficient deeds and conveyances in the law, and to the liking of the said Sir Benjamin Bloomfield and Robert Johnston, well and effectually secure the payment of the said annuity, at the times and in the manner therein mentioned. By the said articles the said John Colpoys Bloomfield covenanted that he would in like manner settle and assure all such property, of which he should hereafter become seised or possessed in right of his said wife, for her use and benefit, and for the use and benefit of the issue of the marriage, in such manner as the said Sir Benjamin Bloomfield and Robert Johnston should, in their discretion, think proper and meet for the benefit of the said Frances Arabella Caldwell and her issue.

By deed of the 10th of December, 1825, executed in pursuance of these articles, Sir John Caldwell conveyed part of the lands comprised in the settlement of the 9th of May, 1789, to trustees, for a term of 300 years, upon trust to secure the due payment of the annuity so covenanted to be paid by the articles of the 19th of May, 1817.

In the year 1823, *Louisa Georgina Caldwell* intermarried with *Sir Josiah W. Hort*; and on the occasion of that marriage a settlement was executed, bearing date the 29th of March, 1823, and made between *Sir John Caldwell*, of the first part; *Louisa Georgina Caldwell*, of the second part; *Sir Josiah W. Hort*, of the third part; *Thomas Dawson Bland* and *Sir Charles Coote*, of the fourth part; *Fenton Hort* and Major General *Arthur Aylmer*, of the fifth part; and *Godfrey Bland* and *Sir Nicholas C. Colthurst*, of the sixth part: whereby, after reciting an agreement on the part of *Sir John Caldwell* to pay a sum of 5000*l.* as the portion of his said daughter, *Louisa Georgina*, and to secure a further sum of 8000*l.*, the said *Sir Josiah W. Hort* and his intended wife, *Louisa Georgina Caldwell*, in consideration thereof, accepted the same, in full satisfaction and discharge of all and every portion or sum of money, to which the said *Louisa Georgina Caldwell* then was, or to which she or the said *Sir Josiah W. Hort* in her right should be, entitled under the settlement of the 9th of May, 1789.

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Sir John Caldwell, by his will of the 20th of April, 1827, directed that the whole of his real and personal estate should descend to his heirs-at-law, in such manner as it would have done in the event of his dying intestate, subject, however, to the payment of his just debts, and such further charges as he should then and thereafter think fit to settle on the same. And he also devised the estate of Redwood (which was not included in the settlement of 1789, and which he had lately purchased) to *John Colpoys Bloomfield*, subject to the payment of 12,300*l.*, and also the expenses attending the said purchase.

Sir John Caldwell died shortly after the date of his will,

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leaving Mrs. *Bloomfield* and Lady *Hort*, who were his only children, his co-heiresses, and sole next of kin him surviving.

By a partition deed of the 22nd of May, 1835, the estate comprised in the settlement of 1789 were divided between *John Colpoys Bloomfield* and *Frances Arabella*, his wife, and Sir *Josiah* and Lady *Hort*; and each share was made liable to one-half of the debts and incumbrances affecting the whole estate, including the annuity of 500*l.* charged by the deed of the 10th of December, 1825, for Mr. and Mrs. *Bloomfield*, and their children.

By the decretal order, which was pronounced in the cause on the 22nd of January, 1842, it was referred to the Master to inquire and report the nature, amount, and particulars of the property, real, freehold, and personal, of which the Defendant, *Frances A. Bloomfield*, or the Defendant, *John C. Bloomfield*, in her right, became seised or possessed of, or entitled to, under the indenture of the 9th of May, 1789, or by descent or otherwise, and what parts thereof, and what estates and interests therein were bound by the articles of the 19th of May, 1817, and the deed of the 10th of December, 1825; and also to inquire and report the rights and interests of the several parties in the cause to the estates and properties, whether real, freehold, or personal, and also to the annuity of 500*l.* mentioned in the said articles of the 10th of May, 1817, and the deed of the 10th of December, 1825.

In February, 1843, the Master made his report under this decree, and, after setting forth the several deeds and facts hereinbefore stated, he reported that the Defendant,

Lady Hort, had, by the deed of the 27th of March, 1823, released her share of the sum of 8000*l.* provided for younger children by the deed of the 9th of May, 1789, and that the Defendant, *Frances A. Bloomfield*, became entitled to 4000*l.*, being the moiety of said sum; that 2000*l.* thereof merged in the inheritance of the moiety of the lands comprised in said deed, which descended to her, but that the remaining 2000*l.* was still a charge upon the other moiety of the said lands, which was conveyed to the use of Sir *Josiah* and *Lady Hort*, by the deed of the 22nd of May, 1835, and that same was secured by the term of 1000 years in the deed of the 9th of May, 1789, mentioned.

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To this report exceptions are taken on the part of Sir *Josiah* and *Lady Hort*, upon two grounds: First, that even if this sum were raisable, that the share of *Frances A. Bloomfield* ought to be considered as satisfied and discharged, as well by the gift of the annuity of 500*l.* provided by the articles of the 10th of May, 1817, and the deed of the 10th of December, 1825, as also by the descent of the moiety of the inheritance upon the said *Frances A. Bloomfield*. Secondly, that as there was no son of the marriage of the said Sir *John Caldwell* and *Harriett Maynell*, or other children, save the two daughters, *Frances A. Bloomfield* and *Lady Hort*, the 8000*l.* provided for younger children of the marriage, under the settlement of the 9th of May, 1789, never became raisable.

Mr. Moore, Mr. William Brooke, and Mr. Robert Johnston, in support of the exceptions. Argument.

The portions provided for the younger children of the marriage, by the settlement of May, 1789, never became

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raisable in the events that have happened. According to the literal construction of the settlement, the portions intended to be provided were only to be raised in the event of there being an eldest son; the words are, "in case there shall be one or more child or children of the said Sir John Caldwell, on the body of the said Harriett Maynell, his intended wife, to be begotten, besides an eldest or only son." There is no reason for departing from the literal construction of the clause, which appears to be quite consistent with the general scope of the instrument itself; because in the event of there being no male issue of the marriage, such a power of charging was not required; the estates would revert to the settlor, Sir John Caldwell, in fee, and he could make any disposition he thought proper in favour of the female issue. But, independently of this view of the settlement, and bearing in mind the extensive rights and beneficial principles of construction, which Courts of Equity adopt in cases of this nature, it is submitted that the two daughters, who were the only issue of the marriage and are the co-heiresses of the settlor, are not to be considered as younger children; they take the estates themselves, and are therefore to be regarded as together constituting an eldest child. In *Beale v. Beale*(a) an eldest daughter was held to be a younger child; and Lord Harcourt there says, "every one but the heir is a younger child in Equity, and the provision which such daughter will have is but as a younger child's, in regard the son goes away with the land as heir." *Butler v. Duncomb*(b), *Chadwick v. Doleman*(c), and *Broadmead v. Wood*(d), are to the same effect. In *Duke v. Doidge*(e) Lord Hardwicke held an eldest son to be a younger child

(a) 1 P. Wms. 244.

(b) 1 P. Wms. 451.

(c) 2 Vern. 528.

(d) 1 Bro. C. C. 77.

(e) 2 Ves. Sen. 203, (n).

for the purpose of provision, considering every child, except the heir, as a younger one; and observing that eldership, not carrying the estate along with it, could not be such an eldership as would exclude from the benefit of a clause making provision for younger children; and in *Lord Teynham v. Webb*(a), the same learned Judge states, "that the words 'younger children' had received a prodigious latitude of construction to answer the occasions of families and intent of the parties;" and he adds, "that the rule laid down by Lord *Harcourt* has been, that younger children shall be considered such as do not take the estate, are not the head and representative of the family;" and this principle appears to have been ever since acted on, and to be now well established. It will be said, that as *Frances A. Bloomfield* claims a moiety of the estate by descent, and not by way of limitation under the settlement, which created the charge upon the estate, that this circumstance will be sufficient to take the present case out of the operation of the rule sought to be applied. But such a distinction does not prevail. It was relied upon and overruled in *Savage v. Carroll*(b), a case cited with approbation in *The Treatise of Powers*(c). The present case comes within a clear principle, that children who take the estate itself could never have been intended to be regarded as, or classed with, the younger children, for whom portions were provided out of that very estate.

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Supposing, however, the Court to be of opinion, that in the events that happened the portions were raisable, then it is submitted, on the part of Sir *Josiah* and Lady *Hort*,

(a) 2 Ves. Sen. 198.

(c) Vol. ii. p. 290.

(b) 1 Ball & B. 265, 278.

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that these portions must be considered as having been satisfied by the provisions made by Sir *John Caldwell*, and that the estate has been in effect discharged. The question now only arises as to the share of *Frances A. Bloomfield*, for the estate has been expressly released from the share of Lady *Hort* by the deed of the 29th of March, 1823, executed on the occasion of her marriage with Sir *Josiah Hort*. With respect to the share of *Frances A. Bloomfield*, it is true that there has been no express release; but, upon well-recognized principles, this Court will regard it as satisfied. To treat it otherwise would be to attempt to establish a double portion for *Frances A. Bloomfield*, against which Courts of Equity always struggle; and notwithstanding that the provision, which the parent may subsequently make, be different from that which he was under an obligation to provide, yet if it be substantially as valuable, they will refer the provision so made to the obligation, and presume that the one was intended to be a satisfaction for the other. In the present instance, the provision that Sir *John Caldwell* made for his daughter was, in the first place, given as a marriage portion; secondly, it was more valuable than the portion, for which it is now insisted that it was a satisfaction, the one being but a sum of 4000*l.*, while the provision actually given to the daughter was an annuity or rent-charge of 500*l.* per annum. If a sum of money had been given instead of the rent-charge, it is quite clear that such would be held to be a satisfaction of the portion. Is, then, the nature of the two provisions in this case so different as to prevent the application of the principle? Clearly not, and the case of *Williams v. The Duke of Bolton*(a), is express upon the point. The case is very defect-

(a) 1 Dick. 405.

lively reported ; but an extract has been obtained from the Registrar's Book in England of the entry in that case(a), from which it appears that it was there decided that a gift of a rent-charge by deed did amount to a satisfaction of a

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(a) The following is a copy of the extract, which is above referred to.

" Between John Williams, Esq. and Mary Charlotte his wife, Mary Banks Brown, and Jean Brown, spinster, commonly called Jean Mary Brown Powlett, an infant, by the said Mary Banks Brown, her mother and next friend,

Plaintiffs.

" The Most Noble Harry Duke of Bolton, and others,

Defendants.

" By original bill and bill of revivor.

" And between the said Most Noble Harry Duke of Bolton,

Plaintiff,

" And the said Mary Banks Brown, Jean Mary Brown Powlett, an infant, by the said Mary Banks Brown, her guardian, John Williams, and Mary Charlotte Thornhill his wife, and others,

Defendants.

" These causes having come on the 6th, 11th, 9th, and 10th of December, instant, and also on this present day, to be heard and debated before the Right Honourable the Lord High Chancellor of Great Britain, in the presence of counsel learned on all sides, the substance of the original bill and the first-mentioned cause exhibited by the present Plaintiffs against the said late Defendant, Thomas Devon, deceased, and all the present De-

fendants, except Robert Child, Robert Lovelace, Robert Dent, and John Church, appeared to be, that the Most Noble Charles late Duke of Bolton, deceased, being seised in fee simple of and in several manors, lands, tenements, and hereditaments, in the County of York, Wilts, and Southampton, of the yearly value of 20,000*l.* and upwards, subject to divers mortgages, and being also possessed of a very considerable personal estate, did, on the 4th of June, 1763, duly make his will, and thereby, after desiring that all his debts should be paid, and charging his real estate with the payment thereof, gave to the Plaintiff, Jane Mary Powlett, commonly called Miss Powlett, the sum of 10,000*l.*, to the Plaintiff, Mary Banks Brown, by the name and description of Mrs. Mary Brown Banks, the sum of 5000*l.*; to the Plaintiff, Mary Charlotte Thornhill Williams (then Mary Charlotte Thornhill More), the sum of 2000*l.*, and to his godson, the Defendant, Charles Durnford, the sum of 1000*l.*, and gave all his monies in the Stocks, or in bankers' hands, to be immediately on his decease, divided between the Plaintiffs; and directed that all the said legacies should be paid to and become vested interests in the said several legatees respectively, at their several ages of twenty-one years or days of marriage, which

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pecuniary legacy given by the will of the same parent.
 In *Grave v. The Earl of Salisbury*(a), a lease granted

should first happen, and that the same should be paid by and out of his manors and lands in the County of York, in case his personal estate should be insufficient for that purpose, together with interest after the rate of four pounds per cent. per annum, to commence from his death; but in case any of the Plaintiffs should happen to die before their legacies should become payable, then the legacy of such of them so dying was not to be raised or paid; and gave and devised unto the Plaintiff, *Jane Mary Brown Powell*, and her assigns, for her life, one annuity or yearly rent-charge of 500*l.*, to be issuing out of and charged upon all his monies, lands, and hereditaments in the said County of York, free from all taxes and deductions, by quarterly payments; and by his said will gave and devised unto the said Defendant, *Mary Banks Brown*, and her assigns, for her life, an annuity or yearly rent-charge of 500*l.* to be issuing out of and charged upon the said manors, lands, and hereditaments in the said County of York, and directed that the same should be payable, free from all parliamentary taxes and deductions whatsoever, by quarterly payments; and the said testator also gave, in the same manner to be paid, 200*l.* per year unto the said Plaintiff, *Mary Charlotte Thornhill Williams* (then *More*), for her life;

and the sum of 300*l.* a year to his sister, the Defendant, *Lady Catherine Drummond*, for her life, with the usual provisos of entry in distress in case of non-payment; and gave and devised all his manors, lands, and hereditaments in the said County of York, unto and charged with the said several annuities; and also all other manors, lands, and hereditaments whatsoever, and of what nature kind soever, unto the Defendants *Francis Banks* and *George Dufford*, to hold to them, their heirs and assigns, to, for, upon, and subject to the several uses, trusts, powers, provisions, and limitations thereafter mentioned.

"That the said *Charles Duke Bolton*, deceased, did, on the 10th of June, 1765, execute a certain indenture mentioned to be made between the said Duke, of the one part, and the Defendant, *William Law*, of the other part, whereby it was witnessed, that for making some provision for the maintenance and support of the said Plaintiff, *Mary Charlotte Thornhill Williams* (then *Mary Charlotte More*), in case she should happen to survive him, and for other considerations therein mentioned, the said Duke did grant, bargain, sell, and demise unto the said Defendant, *William Law*, his executors, administrators, and assigns, all that the said castle of East Bolton, and also the several

(a) 1 Bro. C. C. 425.

son by his parent was held not to be a satisfaction of a pecuniary legacy bequeathed by him to that child : but

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manors, hereditaments, and premises particularly mentioned and described in the said indenture last mentioned, with their appurtenances, to hold the same unto the said Defendant, *William Law*, his executors, administrators, and assigns, from the day next before the date of said indenture, for the term of ninety-nine years then next ensuing, in trust to permit the said Duke and his assigns to hold and enjoy all and singular the said castle, manors, messuages, lands, tenements, and hereditaments thereby demised, and to receive the rents and issues and profits thereof, for his and their own proper use and benefit, from thenceforth, for and during so long of the said term of ninety-nine years as the said Duke should live ; and from and immediately after his decease ; then upon trust, that the said Defendant, *William Law*, his executors or administrators, should, out of the rents or profits of the said premises, raise and pay unto the said *Mary Charlotte Thornhill Williams* (then *More*), or her assigns, for her life, one annuity of three hundred pounds, clear of all deductions, at or upon the four most usual feasts or days of payment in the year, that is to say, Lady Day, Midsummer, Michaelmas, and Christmas, by equal portions ; the first payment to be made on such of the said feast days as should first happen after the decease of the said Duke. And it was by the said

indenture declared, that the said annuity of three hundred pounds should not be subject to the contract debts or engagements of any husband with whom she might intermarry, and that her receipt alone (notwithstanding any future coverture) should be a sufficient discharge ; and in the said deed was reserved a power for the said Duke to revoke or alter the same, as he should think fit. That on the fifth of July, one thousand seven hundred and sixty-five, the said *Charles Duke of Bolton* died, without having altered or revoked the said will, save by the said two codicils thereunto annexed, and without having altered or revoked the said three several deeds before set forth. Whereupon all the executors in the said will named (except the said Plaintiff, *Jean Mary Brown Powlett*, the infant), duly proved the same, and the said codicil, and took upon themselves the execution thereof.

“ And that the said will of the said Duke of Bolton might be declared well proved, and the said will and codicils thereunto annexed, and also the said several deeds of the 10th day of June, one thousand seven hundred and sixty-five, might be established, and the trusts thereof performed and carried into execution ; and that the said Defendant, *Thomas Devon*, might transfer unto the said Plaintiff, *Mary Banks Brown*, for her own use, one-third part of the said twelve thousand five hundred

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that was expressly decided upon the ground of the two subjects not being *ejusdem generis*; and that case admits

pounds, and one thousand pounds reduced Bank Annuities, and might receive and pay unto the said Plaintiff one-third part of the dividends which had become due in respect thereof since the decease of the said testator. And that an account might be taken of all the money belonging to the said testator which was in his banker's hands at the time of his death. And that one-third part thereof ought to be paid to the said Plaintiff, *Mary Banks Brown*, for her own use and benefit; and that the two remaining third parts of the said 12,500*l.*, and 1000*l.* reduced Bank Annuities might be transferred to the Accountant-General of this Court, in trust in this cause, for the benefit of the said Plaintiffs, *Jean M. Brown Powlett* and *Mary Charlotte Thornhill Williams* (then *Mary Charlotte Thornhill More*). And that all the interest and dividends, which had accrued due in respect of those two-thirds since the decease of the said testator, might be applied towards the said Plaintiffs' maintenance and education, or placed out for their benefit, in such manner as this Court should direct. And that two-third parts of the money which the said testator should appear to have had in his banker's hands at the time of his death, not specifically bequeathed to the said Plaintiffs, *Jean Mary Powlett* and *Mary Charlotte Williams* (then *More*), might be paid into the bank, and placed out in the name of the

said Accountant-General, in reduced Bank Annuities, for the benefit of the said Plaintiffs, *Jean Mary Brown Powlett* and *Mary Charlotte Thornhill Williams* (then *More*), in equal moieties, in trust in this cause, and subject to the further order of this Court. And that the dividends which should accrue due, from time to time, in respect thereof, might be either employed for or towards the Plaintiffs' maintenance and education, during their respective minorities, or placed out for their benefit in such manner as this Court should direct. And that an account might be taken of the personal estate of the said testator, not specifically bequeathed by his will, or comprised in the said deed of the 10th of June, 1765; and also of the rents and profits of his freehold and leasehold estates received by the said Defendants, the present Duke of *Bolton*, *Charles Powlett*, *Francis Banks*, *George Durnford*, and *William Law*. And that an account might be taken of the debts, legacies, and funeral expenses of the said testator. And that the personal estate of the said testator might be applied in a course of administration: first, in the payment of his funeral expenses and debts, and then in payment of his legacies. And in case the same should not be sufficient for that purpose, then that the rents and profits of the said testator's freehold and leasehold estates, received since his death, might be

distinctly that if they had been so, the one must have been held to be a satisfaction of the other. In *Bengough v.*

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applied for that purpose, so far as the same extend. And in case there should be a deficiency, that such deficiency might be made good by mortgage or sale of a competent part of the said testator's real estates. And that the legacies and gifts bequeathed and made to and in favour of the said Plaintiffs, *Mary Banks Brown*, *Jean Mary Brown Powlett*, and *Mary Charlotte Thornhill Williams* (then *More*), by the said testator's will, and the said deeds of the 10th of June, 1765, together with interest for the same, from the time the same became due, might be raised in such manner as this Court should direct. And that what the said Plaintiff, *Mary Banks Brown*, was entitled to under the said will and deeds, might be paid to her when raised. And that what the said Plaintiffs, *Jean Mary Brown Powlett* and *Mary Charlotte Thornhill Williams* (then *More*), should be entitled to under the said will and deeds, might be secured for their benefit, in such manner as this Court should direct. And that a proper person or persons might be appointed by this Court to receive the growing rents and profits of the said testator's freehold and leasehold estates; and that he or they might thereout pay and keep down the interest of all the mortgages and incumbrances, and the annuities affecting the said testator's estates. And that inventories might be taken of the said testator's house-

hold furniture, plate, pictures, china, and other effects at the said testator's house of Hachwood and Grosvenor-square aforesaid, at the time of the execution of the said deed of the 10th of June, 1765, and of the death of the said testator respectively. And that the said Defendant, the present Duke of *Bolton*, might be decreed to deliver to the said Plaintiff, *Mary Banks Brown*, the said town plate, and the said landau coach and horses, which were in the said house and offices belonging thereto, in Grosvenor-square aforesaid, at the time of the execution of the said deed of the 10th of June, 1765. And that a proper person or persons might be appointed guardian or guardians of the persons of the said Plaintiffs, *Jean Mary Brown Powlett* and *Mary Charlotte Williams* (then *More*), during their respective minorities. And that a proper allowance might be made for their respective maintenance and education. And that all the deeds, evidences, and writings relating to or in anywise concerning the estates of the said testator, *Charles* late Duke of *Bolton*, and devised by his said will, or comprised in the said deeds or any of them, be brought into and deposited in this Court, for the benefit of all persons interested therein. And that an account might be taken of the timber and trees cut and fallen from off the said devised or settled estates, by or by the order of the

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Walker(a), a bequest by a parent to his child of a share in certain powder mills, with as much money as, being added thereto, would make up in the whole a particular sum, was held by Sir *William Grant* to be a satisfaction of the provision, which the father by settlement covenanted to make for that son. In the case now before the Court, the annuity of 500*l.* is *ejusdem generis* with the portion provided by the settlement: it is of much greater value, and was, in point of fact, given as a portion. In addition to this, it is to be remembered that the father, Sir *John Caldwell*, allowed a moiety of the estate to descend to *Frances A. Bloomfield*. It is impossible to suppose that he could ever have intended that one daughter should have a

said Defendant, the present Duke of *Bolton*, since the decease of the said testator. And that the full value thereof might be paid by the said Defendant, and applied as this Court should direct. And that the said Defendant, the Duke of *Bolton*, might be restrained by injunction from cutting or felling any more timber or trees from off the said premises, or any part thereof; and from committing any further waste or spoil thereon, or upon any part thereof. And to be relieved in the premises, was the scope of the said original bill.

"His Lordship doth declare the will of the said testator, *Charles* late Duke of *Bolton*, and the said three deeds of the 10th of June, 1765, well proved, and that the same ought to be established, and the trusts thereof performed, and carried into execution; and doth order and decree the same accordingly. But his Lordship

doth declare that the Plaintiff and the original bill are not entitled to the double provision made for them by the said will and deeds, being of opinion the provisions by the said deeds have adeemed and satisfied the provisions by the said will. And that the said Plaintiffs have no interest whatever under the said will, except only that the said Plaintiff, *Jean Mary Brown Powlett*, is not to be barred of her interest in the estates of the said testator, by way of remainder, given her by the said will.

"And as to the 300*l.* a year given to the said Plaintiff, *Mary Charlotte Williams*, for her separate use, it is ordered that the same be paid to her, for which her receipt alone is to be a discharge."—*Reg. Lib.* 1768 B., fol. 600.

(a) 15 Ves. 507.

moiety of the estate, a rent-charge of 500*l.* per annum, and, in addition to all this, half of her portion as a younger child. Unless the Court can now clearly discover that such was the intention of the father, it ought not to support the claim contended for on her behalf.

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Mr. Serjeant *Warren*, and Mr. *Monahan*, for the Defendants, *John C. Bloomfield* and *Frances Arabella Bloomfield*.

The portion of 8000*l.* provided by the settlement of the 9th of May, 1789, was clearly raisable in the events that happened; it was intended to be a provision for the younger children of the marriage, and it is now well established, that every child is, in the contemplation of a Court of Equity, regarded as a younger child, who does not, under the provisions of the settlement itself, take the estate. In the present case, the intention of the parties to the settlement appears to be very clear; they obviously meant to secure the estate itself for the eldest son, providing, however, thereout for the younger children; but they never intended to make the provisions for those younger children dependent upon the existence of a son, who was to take the estate under the settlement. Here the daughters derive no right whatsoever to the estate under the settlement. In the events which have occurred, according to the argument at the other side, they are totally unprovided for, and would be dependent upon the will of their father. Could it for a moment be supposed that such an intention ever existed in the mind of the framer of, or the parties to, the settlement of 1789, and will the Court now so construe the settlement, as to hold that such must have been the intention and arrangement? Suppose the father had sold the estate, or settled it, upon the occasion of a second marriage, to the complete

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exclusion of the daughters of the first marriage, will the Court now say, that he was at liberty to have done so? Yet this strange consequence must flow from the construction contended for at the other side. The circumstance, that the father has not done so, cannot be fairly relied on in argument upon the question of construction. If upon the part of *Frances A. Bloomfield*, it can be shewn, that to construe the settlement as insisted upon, would lead to a monstrous conclusion, and one most inconsistent with the whole character of the instrument, the Court will feel but little difficulty in rejecting such a construction. None of the cases which have been cited govern this case, but they clearly shew the length to which Courts of Equity have gone in construing settlements of this description, and carrying out fully the intention of the parties. In this respect, therefore, they are all authorities in support of the rights of the Defendant *John C. Bloomfield*, and *Frances A. Bloomfield* his wife.

Then, as to the question of satisfaction : regarding this case simply in reference to the gift of the annuity, the question is, can the grant of an annuity operate as a satisfaction of a sum in gross, charged by a settlement as a portion for younger children. The principle is most clearly laid down by Lord *Hardwicke* in *Bellasis v. Uthwatt*(a). He says, "the thing given must be of the same nature, and attended with the same certainty as the thing in lieu of which it is given, and land is not to be taken in satisfaction for money, nor money for land." This principle applies here ; the provision made by the settlement was money, the portion actually given upon the marriage of *Frances A. Bloomfield* was an annuity or rent-charge. The subjects

(a) 1 Atk. 426.

are widely different ; the rights of the parties are different ; the portion was the absolute property of *Frances A. Bloomfield* ; in the annuity she has but a life interest ; and though, perhaps, one may have been more beneficial than the other, yet that circumstance alone is not sufficient. It is true that the leaning of the Court is against double portions ; nevertheless, the application of that principle has always been excluded by slight differences existing between the two provisions : *Duffield v. Smith*(a), *Alleyn v. Alleyn*(b), *Eastwood v. Vinke*(c), *Chaplin v. Chaplin*(d), *Weall v. Rice*(e), *Hall v. Hill*(f). In this case the very fact of there being contained in the settlement of Lady *Hort*, an express release of the estate from her share, while the settlement, executed on the occasion of the marriage of her sister, the Defendant *Frances A. Bloomfield*, is in this respect silent, shews that a different intention must have prevailed in reference to that share. As to the case of *William v. The Duke of Bolton*(g), the question there was one of ademption of a legacy ; which is very different from the taking away vested rights under a settlement entered into upon the occasion of marriage. If, then, the rent-charge is not to be considered as a satisfaction of the portion, how can the descent of the estate affect the question ? No inference of intention can be drawn from the will, the testator having provided that the estates should go, as if he had died intestate. As to the moiety of the portion, charged upon the moiety of the estate, which descended upon *Frances A. Bloomfield*, there is a merger ; but there is none as to the moiety charged upon that moiety of the

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(a) 2 Vern. 258.

(b) 2 Ves. Sen. 37.

(c) 2 P. Wms. 614.

(d) 3 P. Wms. 245.

(e) 2 Russ. & M. 251.

(f) Ante, vol. i. p. 94.

(g) 1 Dick. 405.

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[The LORD CHANCELLOR referred to the case of *Church v. Edwards(b)*, upon the question, how far the portions were affected by the descent of the estate to the daughters.]

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THE LORD CHANCELLOR :—

Two questions arise in this case : first, whether the portions intended to be provided for younger children, by the settlement of 1789, are raisable : secondly, if raisable, whether the subsequent acts amount to a satisfaction of those portions, or a performance of the trust created for raising them.

The first question depends upon the construction of the settlement of 1789. By that deed the estate was limited to the settlor for life, with remainder to his first and other sons in tail male, with remainder to the settlor himself in fee : and there was a trust term of 1000 years created, of course preceding the estates tail limited to the sons of the marriage, for the purpose of securing portions for the younger children. The settlor did not choose to provide for female issue in the limitations of the estate itself. He confined the limitations to issue male ; and in case of failure of such issue, he provided that the estate should revert to himself, so that he would again become the owner of the fee. In the event of there being daughters only of the marriage, the settlor would have it in his own power to

(a) 2 Vern. 348.

(b) 2 Bro. C. C. 180.

provide for them as he pleased ; and if he did not choose to exercise his power of disposing of the estate, the law would provide for them, by the descent of the fee upon them, as his co-heiresses at law.

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In general, where, as in this case, an estate is limited only to the issue male of the marriage, and the ultimate reversion is to the settlor himself, and it is intended to provide portions for the daughters, the trusts for raising them are framed so as to take effect, in case there should be an eldest or only son, and one or more daughter or daughters : for if there be an eldest or only son, who will take the whole estate, it is but just that he should take it charged with portions for the daughters of the marriage ; but if there should be a failure of issue male, in which event the whole estate would revert to the settlor in fee, it does not follow that he intends to incumber the estate with portions for his daughters. But where the intention is to provide portions for daughters generally, younger sons are also provided for ; and the common form is, to declare that in case there shall be any child or children, other than, or besides, an eldest or only son, the portions shall be raised for the younger children. In this way both events are provided for. If there be an eldest or only son, and one or more other child or children, that is included in the word “ besides,” which means in addition to, over and above, an eldest or only son : and if there should be no son, that event is included in the words “ other than,” which convey the same meaning, as there not being an eldest or only son. When it is the intention that portions shall in all events be provided for the daughters, but that if the settlor gets back the estate, there are to be additional portions, the form usually adopted is this, that in case there

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should be no son, or, being a son, he should die before twenty-one, without issue male, and there should be one or more daughters, the trustees should raise the additional portions.

The settlement now before me does not contain any thing to shew the intention of the parties, beyond what is contained in the trusts themselves. The estate is limited to trustees, for a term of ninety-nine years, to secure an annuity for the intended wife during her coverture, and subject thereto, to Sir *John Caldwell* for life; with remainder, subject to a jointure for the wife in the event of her surviving her husband, to trustees for the term of 1000 years; with remainder to the first and other sons of the marriage in tail male; with remainder to Sir *John Caldwell* in fee. The clause respecting the raising of the portions is in these words: "if there shall be one or more children of the said Sir *John Caldwell*, on the body of the said *Harriett Meynell* to be begotten, besides an eldest or only son, then upon trust," &c. Therefore if these words stood alone, and unexplained, it appears to be clear that there must have been an eldest or only son, as well as a younger child, to warrant the raising of the portions, the word "besides" plainly meaning over and above, or in addition to. The trust is to raise 8000*l.* "for the portion and portions of all and every such child or children, not being an eldest or only son as aforesaid," referring to what had been said before; that is perfectly accurate, for though the word "such" might refer to children of the marriage generally, who had been mentioned in the preceding passage, yet that passage, taken altogether, is confined to children besides an eldest son, and shews that the trusts were intended to be restricted to that class of children. The

words, "not being an eldest or only son," might seem to include the event of there being daughters only, and no son; but they are qualified by the addition, "as aforesaid," which words obviously mean, that the portions are to be provided for the children, who had been described before, that is, children who are "besides," or "other than," or "in addition to," an eldest or only son: otherwise, these words, "as aforesaid," would mean nothing. This shews that the parties in this passage meant only to repeat what they had already said, that the trust was to raise 8000*l.* for portions, if there should be any child or children of the marriage, besides an eldest son. Then follow these words, which seem to render the intention still more clear: "the same to be paid in manner following, that is to say, if but one such child, being a daughter, the whole sum to be paid to her; but in case such only younger child should happen to be a son," he was only to receive 5000*l.* It is clear that this last provision supposes the existence of an eldest son; for the son there mentioned, and who was, in the event specified, to receive 5000*l.*, must be a younger son, for otherwise he would be the owner of the estate, under the limitations of the settlement. Upon the rules of construction, it appears to me that the portions are not raisable in the events which have happened. The settlement, however, is inaccurately drawn.

Then comes this singular proviso: "That it shall be lawful for the said Sir *John Caldwell*, in case the intended marriage shall take effect, and that there shall be issue thereof more or besides an eldest or only son, by deed or will, to charge all the said hereditaments with payment, unto such younger child or children, of the sum of 2000*l.* Irish money, in such parts and proportions, and to vest and

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be paid at such times, as the said *Sir John Caldwell* shall by such deed or will direct." It is not said that this sum is to constitute additional portions for the children; but it seems as if the parties had forgotten that a provision had been made in a previous part of the settlement for the particular event, which is referred to in this proviso. However, this clause seems to shew the intention of the parties, and to explain the meaning of the word "besides," which was used in the first proviso; for here it is shewn to mean more than an eldest or only son.

The proviso for cesser of the term follows, "that in case there shall be no such child or children of the said *Sir John Caldwell*, on the body of the said *Harriett Meynell*, his intended wife, to be begotten, other than an eldest or only son as aforesaid," &c., the term was to cease. This is not very clear, but it is quite consistent with what has gone before; for the words being "such children," may mean children described in the previous part of the settlement; that is, children "besides," or "more than," or "in addition to," an eldest or only son. Then follows the extraordinary proviso (which shews that the framer of this settlement was a little out of his depth), giving to *Sir John Caldwell* a power of providing a jointure for any after-taken wife, and also portions of 4000*l.* for the children of such marriage, in case "the said *Sir John Caldwell* shall happen to survive the said *Harriett Meynell*, his intended wife, and there shall be no child or children, male or female, between them begotten." Now, in that event, *Sir John Caldwell* would take the fee, and therefore would want no power from the settlement. But the clause purports also to provide for a second state of circumstances: in case there should be any child or children of the mar-

age, all of whom should happen to die in the life-time of the said Sir John Caldwell, before any of them should attain the age of twenty-one years : although the former power was useless, as Sir John Caldwell, in the event there contemplated, would himself have been the owner of the estate, yet, in the latter, the power is one which might be exercised, and would, in one event, be requisite, namely, at the birth of a son of the marriage, who died under twenty-one, leaving issue male ; such issue male would take the estate under the limitations of the settlement, and Sir John Caldwell would be unable to make provision for any after-taken wife, or the issue of such marriage. Upon the whole of the case, I am of opinion, that in the events which have happened, the portions are not raisable.

This renders it unnecessary for me to consider the second question ; but the case of *Williams v. The Duke of Bolton*(a) seems to have decided, that a gift of a rent-charge may be a satisfaction of a gross sum charged upon land. The case of *Church v. Edwards*(b), to which, in the course of the argument, I called the attention of the counsel, has been much discussed(c), but I believe it has been always followed. The principle of it was applied, in *Smith v. Frederick*(d), to the case of portions charged on an estate, which descended to the daughters. Lord Gifford held, that neither daughter could go upon her sister's lands for her share of the portions. That appears to me to be perfectly right. But as I am not called upon to decide the point, I shall say nothing further upon it.

The second exception must be allowed.

(a) 1 Dick. 405.

(d) 1 Russ. 174.

(b) 2 Bro. C. C. 180.

(c) Preston's Treatise on Conveyancing, vol. iii. p. 90.

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May 11, 12.
 Bill for the renewal of a lease for three lives, containing a covenant for perpetual renewal, by the trustees of a marriage settlement, to whom the lease had been assigned upon certain trusts, dismissed with costs, the right of renewal being held to have been forfeited in consequence of the laches and neglect of the parties interested.

Where such a lease is in settlement, it is the duty of the trustees to make full inquiry as to the existence of the lives, and the state of the property; and it is no answer to the landlord insisting upon the forfeiture, to say, that all the communications which took place were with the tenant for life, and that he alone ought therefore to be answerable for the delay.

Discussion upon the doctrine of waiver by a landlord of his rights.

THE bill in this cause was filed to obtain the renewal of a lease of the 26th of June, 1735, pursuant to the covenant for perpetual renewal therein contained. It appeared that by a certain indenture of lease of the 26th of June, 1735, *Thomas Tipping* demised the lands of Altnamoyhan unto *Alexander M'Combe*, his heirs and assigns, to hold for the lives of the said *Alexander M'Combe*, *Arthur M'Combe*, and *Thomas Tipping, Junr.*, at the rent of 4s. per acre; and the said *Thomas Tipping* did, for himself, his heirs and assigns, covenant, promise, and agree to and with the said *Alexander M'Combe*, his heirs and assigns, that from time to time, and at all times thereafter during the term thereby granted, as often as any of the lives, for which the said premises were thereby demised, or any of the lives that should thereafter be inserted in any other of the leases of the said demised premises that should, by virtue of those presents, thereafter be made by the said *Thomas Tipping*, his heirs or assigns, happen to fail, he, the said *Thomas Tipping*, his heirs and assigns, should and would from time to time, and at all times thereafter, at the request and proper cost of the said *Alexander M'Combe*, his heirs and assigns, upon payment of all rent that should be then due or in arrear on the said demised premises, and the said *Alexander M'Combe*, his heirs and assigns, further advancing and paying unto the said *Thomas Tipping*, his heirs and assigns, by way of

fine, within nine calendar months next after the death of said life, in that or any of the leases that should thereafter be made by virtue of those presents, one quarter of a year's rent (which was to be recovered in such manner as the said reserved yearly rent), perfect a new lease of the demised premises unto the said *Alexander M'Combe*, his heirs and assigns, at and under the said reserved yearly rent, reservations, provisoes, and agreements contained in that lease, for such life or lives as should be then in being, and also for one other life, or for two other lives, if two of the lives should happen to die within the said nine months, then to be named and added by the said *Alexander M'Combe*, his heirs or assigns, in the place or room of such life or lives as should have happened to fail; the said *Alexander M'Combe*, his heirs or assigns, likewise tendering to the said *Thomas Tipping*, his heirs or assigns, such new lease, fairly writ on parchment, and perfecting a counterpart at the same time thereof, to the intent that he, the said *Alexander M'Combe*, his heirs and assigns, if it be not his own fault or neglect, by not naming lives in the place and stead of those that should happen to die, and paying the respective fines in such manner as was thereinbefore directed, within the respective times agreed upon by those presents, might, at all times for ever thereafter, have a term of three lives in being in the said demised premises, under the same reserved rent, fines, covenants, and agreements, mentioned and contained in those presents.

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Two of the lives in this lease having died, by deed of the 26th of August, 1793, the lease was renewed for the lives of *Edward Tipping* and *Alexander M'Combe*, the son of the lessee. The reversion having subsequently become vested in *Joshua M'Geough*, and the interest of the lessee in his son,

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Alexander M^cCombe, one of the *cestui que vies* in the renewal of the 26th of August, 1793, on the 17th of April, 1801, a renewal of said original lease was executed by the said *Joshua M^cGeough* to *Alexander M^cCombe*, for the lives of *William M^cGeough* and *Joseph John M^cGeough*, in addition to that of *Alexander M^cCombe* himself. This was the last renewal, which was executed.

The bill stated, that by a certain indenture of settlement bearing date the 2nd of September, 1824, and made between the said *Alexander M^cCombe*, of the first part; *Jan Godby*, and *Esther Godby*, her daughter, of the second part; and *Edward Townley* and *John Townley* (the Plaintiffs in this cause), of the third part, being the settlement executed previously to the marriage of *Alexander M^cCombe* with the said *Esther Godby*, the said *Alexander M^cCombe* granted and released, among others, the lands comprised in the said original lease, and the renewal thereof, and all his interest therein, to the said Plaintiffs, to hold the same for and during the natural lives and life of the said *Alexander M^cCombe*, *William M^cGeough*, and *Joseph John M^cGeough*, upon trust, from and after the solemnization of the said intended marriage, to pay and discharge the yearly rents reserved and payable by said indenture of demise, as same should become payable; and also all such fines, rents, and expenses, as should become payable upon or for any renewal or renewals of said terms, pursuant to the covenants for that purpose therein contained; and after payment thereof, upon trust to permit and suffer said *Alexander M^cCombe* to receive and take the residue of the rents, issues, and profits thereof, for and during the term of his natural life; and from and after the decease of the said *Alexander M^cCombe*, in case the

■ said *Esther Godby* should happen to survive him, upon
 ■ trust, to permit the said *Esther Godby* to receive and take
 ■ an annuity or yearly rent-charge, by way of jointure ; and
 ■ subject thereto, to the use of the first and every other son
 ■ and sons of the said marriage, severally and successively ;
 ■ and in default of such issue, to the use of the daughters of
 the said marriage, as tenants in common, and to the issue
 male of such daughters ; and in default of all such issue, to
 the use of the right heirs of the said *Alexander M^cCombe*,
 ■ for ever.

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■ It appeared that *Esther Godby* had been a ward of the
 ■ Court of Chancery at the time of the marriage in question,
 ■ which had been solemnized in Scotland, and without the
 ■ permission of the Court ; and that her fortune was then,
 ■ and has been ever since, standing to the credit of a certain
 ■ cause, entitled the cause of *Godby v. Godby* : that by
 ■ an order of the 25th of January, 1825, it was referred to
 ■ *Thomas Ellis*, Esq., one of the Masters of the said Court
 of Chancery, to inquire and report, amongst other things,
 whether it would be for the benefit of the said *Esther*
M^cCombe, that any and what part of the funds constituting
 her fortune should be applied in obtaining a renewal of
 the lands, comprised in the said deed of settlement : that
 the Master made his report on the 8th of May, 1827, and
 thereby reported, that inasmuch as some life or lives, for
 which said lands were held, had fallen, it would be for the
 benefit of the said *Esther M^cCombe*, whose jointure was
 chargeable thereon, that same should be renewed.

The bill then stated, that at the time of the making of
 said report, it was not known how many of the lives in the
 last renewal were in being ; that in addition to such

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ignorance, a survey, which was to have been made, for the purpose of regulating the amount of the rent, which was an acreable one, had never been made : and that on the 2nd of August, 1827, another order of reference was pronounced, directing the Master to inquire and report the amount due for renewal fines, and to approve of a fit and proper deed of renewal.

The bill then stated, that a letter, bearing date the 19th of August, 1829, was addressed by Mr. *Crawford*, the solicitor for the minor, and who was also the solicitor acting on the part of the Plaintiffs, to *Walter M'Geough Bond* (the Defendant in the cause), in whom the estate of *Joshua M'Geough* had vested, informing him of the settlement of the 2nd September, 1824 : that a proportion of the lady's fortune had been set apart for the purpose of paying off the arrears of rent, and any renewal fines that might be due ; and making inquiries as to the date of the last renewal, the lives, for which it had been granted, and the amount of the arrears of rent and renewal fines : that to this letter a reply was written by Mr. *L. Dobbin*, the law agent of the Defendant, on the 31st of August, 1829, stating that he had been applied to on the part of the landlord's agent, and had advised that the right of renewal was forfeited, and that nothing further could be done on the part of the landlord : that subsequently, however, on the 8th of April, 1833, Mr. *Dobbin* wrote the following letter to *Alexander M'Combe* :

“DEAR SIR,—I am happy to say that, in an interview I had with Mr. *M'Geough Bond* this day, he authorized me to approve of your renewals, provided they are immediately arranged. I believe they are to be made to your

trustees. I think it right to add, that this proceeded entirely from Mr. *Bond* himself; that he was aware of his right to refuse renewing, but that he appeared to feel for your situation, especially as you are a married man, and have made it the subject of settlement. Do not neglect this longer; and believe me

“ Faithfully your’s,

“ LEONARD DOBBIN.

“ *Alexander M^cCombe, Esq.,*

“ &c. &c.”

The bill stated, that on the 27th of January, 1834, a further order of reference was obtained, directing the Master to inquire and report whether it would be for the benefit of the said *Esther M^cCombe*, that the arrears of rent and renewal fines, and interest, should be paid out of her fortune; and if so, to report the sums due on foot thereof. That the Master, by his draft report (which was not signed, as the bill charged, from the want of information with respect to the amount of renewal fines), approved of such application of the fortune of the said *Esther M^cCombe*, and also of the draft of a renewal, founded upon one, which had been prepared by the law agent of the Defendant some time before. That same, as approved, had been sent, in the month of August, 1834, to Mr. *James M^cWatty*, the land agent of the Defendant, and by him subsequently returned to *Alexander M^cCombe*. That on the 10th of October, 1836, the Plaintiff’s solicitor addressed a letter to the Defendant’s law agent, informing him that the draft of a renewal had been prepared, and that same had been furnished to the Defendant’s land agent; that the fund applicable to the payment of the rent and renewal fines was the fortune of the said *Esther M^cCombe*, and was

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detained in court; but that an order could be obtained for payment of the rent and fines, upon the Defendant's handing over the renewal executed. That some claim for costs having been set up by the Defendant's law agent, in his reply, which bore date the same day, he was required by the Plaintiff's solicitor to state the amount and particulars thereof: that he subsequently represented that these costs amounted to between 35*l.* and 40*l.*, but that the particulars thereof had never been furnished. That the Plaintiffs and those concerned for them, being thus unable to calculate the amount due for rent and renewal fines, subsequently, upon the 26th of March, 1839, at the suggestion of the Master of the Rolls, caused a notice to be served upon the Defendant, requiring him to furnish a statement of the arrears of rent and renewal fines then remaining due, and an account of such claim as his solicitor might make with respect to costs; informing him that same was so made with the view of obtaining, out of the funds in court, a sum sufficient to discharge same; but that no answer was ever returned to said notice.

The bill then stated, that the Plaintiffs having failed to obtain from the Defendant the necessary information, and having ascertained that only one of the lives in the last renewal, viz. *Joseph John M^cGeough*, had died: that at last they had learned that he had died at Cheltenham, in the year 1802: that having thus obtained the requisite information, the Master thereupon made his report on the 28th of May, 1839, and thereby reported that there was due to the Defendant, up to the 1st of May, 1839, for renewal fines and arrears of rent, the sum of 361*l.* 2*s*. That the Plaintiffs being unable to ascertain where the Defendant resided, but having discovered that the Messrs

La Touche were his bankers, had caused said sum of 361*l.* 2*s.* to be lodged to his credit in said bank : and that the Plaintiff's solicitor wrote to the Defendant, on the 13th of July, 1839, informing him of the lodgment, and that it exceeded (as was subsequently discovered) the sum due, by the amount of one year's rent, but suggesting that same might stand to the credit of the year's rent, which was to become due on the 1st of May, 1840.

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The bill then stated the tender of the drafts, which had been engrossed, for execution, and the refusal, on the part of the Defendant, to execute same ; and prayed that the Defendant should be ordered to execute same, or, if necessary, that it should be again referred to the Master, to report the sum remaining due for arrears of rent, renewal fines, and interest, and to approve of a further deed of renewal.

The Defendant by his answer stated, that the information necessary to enable the Plaintiffs, or those concerned for them, to calculate the amount of the arrears of rent, and the renewal fines, had not been withheld by the said Defendant, or those acting for him ; that on the contrary, it was well known, at least to the said *Alexander M^cCombe*, when the said *Joseph John M^cGeough* had died ; for that the Defendant, through his agents, had repeatedly, prior to the year 1822, both verbally and by letter, informed the said *Alexander M^cCombe* of such fact, and intimated to him the necessity of obtaining the renewal, and paying the amount of renewal fines due thereon : and that finding such communications unattended to, he caused a notice in writing, signed by Mr. *M^cWatty*, his land agent, to be personally served on the said *Alexander M^cCombe*, on the

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23rd of January, 1822, informing him of the death of the said *Joseph John M'Geough*, and calling upon him forthwith to come in, and renew said lease : and that in order to ascertain the rent and renewal fines, he had, by the same notice, nominated a surveyor to attend on the lands, on a certain day therein mentioned, and requiring *M'Combe* to attend him : that the Defendant's land agent did accordingly attend at the time appointed, and was met by *M'Combe* : that the survey was accordingly made, and the acreage of the lands ascertained : that thereupon, sometime in or about the year 1824, a draft renewal was furnished by the Defendant's solicitor to the said *M'Combe*, reciting the said survey, and the rent ascertained in reference thereto ; but that same was never executed, and that nothing was ever done in relation thereto.

The Defendant by his answer further stated, he admitted that he had received the letter of the 19th of August, 1829, from Mr. *Crawford*, the Plaintiff's solicitor : that he handed same to his law agent, by whom, on the 31st of August, 1829, the following reply was written to Mr. *Crawford* :

“DEAR SIR,—I have been forwarded your letter relative to Mr. *M'Combe's* renewal. Upwards of seven years since, *M'Combe* was served with a regular notice, requiring him to renew ; and more than five years ago, the draft of a renewal was actually furnished to him ; but up to the present day, no further step has been taken. Under these circumstances, on being applied to by the landlord's agent, I advised that, in my opinion, the right of renewal had been forfeited, and that nothing further could be done, for the present, on the landlord's part. I cannot see any thing

The present posture of the case to justify me in changing
my opinion ; and I thought it right to give you this inti-
mation of my sentiments, and the opinion I have given on
the subject.

“ I remain your’s, &c.,

“ L. DOBBIN.”

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The Defendant, by his answer, further alleged, that he had
refused, and still persisted to refuse to execute said renewal ;
and in justification of such refusal he stated several letters,
copies of which had already been mentioned, which had been addressed
to the Defendant’s law-agent to the Plaintiff’s solicitor, from
which it appeared, that at all times he made it an unqua-
lified condition to assenting to any arrangement in respect
of the forfeiture, which had been incurred so long previously,
that all renewal fines and interest thereon should be imme-
diately paid off. These letters, which were all read in evi-
dence, will be found stated hereafter, according to their dates.

With respect to the fact that the Defendant’s law-agent
did not furnish the particulars of the sum claimed for
costs, the Defendant stated, that as he considered all right
if a renewal had been forfeited in consequence of the ne-
glect of *M^cCombe*, that he had directed same to be fur-
nished to himself, and that he had subsequently actually
paid the amount.

The following are the letters which were particularly re-
ferred to. The letter of the 3rd of October, 1836, from
L. Dobbin to *A. M^cCombe*, was as follows :

“ DEAR SIR,—At your desire I brought down the
papers in my possession, relative to the lands you hold
under Mr. *M^cG. Bond*, to the last Armagh assizes, and

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retained them there until a few days since, when I was obliged to come to town, and brought them along with me. Several years since, I told you that I thought you had, in law and Equity, forfeited all claim on Mr. *Bond* for a renewal, in consequence of your neglect to take out same, after notice served so long before. Mr. *Bond*, however, was willing to waive this right, had you even then come forward and taken out the renewal, and paid the fines due; and under this impression I long since sent you the draft renewal, which, from that hour to the present, I have not seen. As to Mr. *M'Watty*, you well know that when the matter is once handed over to the law agent, the land agent can interfere no more in it, and I believe Mr. *M'Watty* appears as much surprised as I am at your application to him. I know not how far, at this very remote period, and after so many fruitless applications to you, Mr. *Bond* would be disposed to sign a renewal; but from the kind manner in which he formerly spoke on the subject, I think he would act fairly and liberally on that head. I have, however, no authority to bind him on this subject, much less his minor child, if anything should happen him; and I now, for the last time, write to you on the subject, urging you to have the draft renewal I sent returned, approved of by you, or with your objections thereto stated in writing, that I may try to get the renewals executed, and the property saved for your family, in spite of your laches and delays. Do not lose sight of this, as I may not again have the opportunity of assisting you in the matter."

On the 10th of October following Mr. *Crawford* wrote to Mr. *Dobbin* :

"DEAR SIR,—I should not have taken the liberty of addressing you but for a letter that I have received from

Mr. *M'Combe*, which, though dated on the 4th instant, did not come to hand until a late hour on Saturday evening last. Mr. *M'Combe* has enclosed me your letter to me of the 3rd instant, in which you mention that you had since sent him a draft of the renewal which he seeks, and that you had not seen it from that to the present time. I believe that you are aware that the funds applicable to the payment of the renewal fines are the fortune of Mrs. *M'Combe*, who was a ward in Chancery; her fortune being detained in Court, and the order, of which I have the charge, referring it to Master *Goold* to approve of a renewal to be executed to the trustees of the marriage settlement, and having been furnished with the draft, as prepared by you, I had it transcribed, and, under the Master's directions, sent it to his counsel to be approved of on his part, and afterwards I had the draft, as approved of by him, copied and sent to Mr. *M'Combe*, in order that it might be presented to you for approval on the part of Mr. *Bond*. It would appear, from the correspondence which I have just read, as if this draft, so approved of, did not reach your hand, and I am at a loss for any satisfactory reason to account for that omission, as the order of reference, in addition to its directing the Master to approve of a proper sum of renewal, directed him also to report the sum due for renewal fines; and I afterwards, at Mr. *M'Combe's* desire, procured a supplemental order, directing the Master to report the arrears of rent also, so as to provide a fund for the payment of both the arrears of rent and renewal fines, when the renewal should come to be executed; but owing the delay that had taken place, I thought it better to avoid taking the Master's report, until there should be some certainty of the time, at which the renewal might be executed, because the interest on the renewal fines was

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running on from day to day, and further arrears of rent may have been accruing. You must be aware that the Court will not pay the money upon the prospect of the renewal being executed; but as you and Mr. *Bond* both seem desirous of serving Mr. *M'Combe* and his family, and as Mr. *M'Combe* gave the draft of the renewal, as approved of by the Master's counsel, to Mr. *M'Watty*, by whom, as I should infer from your letter, it was not sent to you, as it ought to have been, I shall, if you please, have it re-copied for you, and, when finally approved of, it may be engrossed either in your office or in mine, just as you please. I can procure an order of Court to pay Mr. *Bond*, or you as his attorney, the amount of the rent and renewal fines, upon your handing over the renewal executed, but it is impossible to procure the money out of Court upon any other condition. I send you with this letter another letter from Mr. *M'Combe* to you upon the same subject."

On the same day, Mr. *Dobbin* replied:

"DEAR SIR,—I have received your letter, and beg to assure you that I really did not know how Mr. *M'Combe's* affairs were circumstanced. My letter to that gentleman stated the fact, that by his desire I long since prepared the draft renewal, and sent it to him for his approval, but from that hour until the present I have never seen it or any copy of it. I cannot say whether or not Mr. *Bond* will now waive his right to the forfeiture, but I am sure if he does so, it will only be on the terms of having all costs and expenses paid, which are considerable. As to my interfering in the matter, I cannot, until something is done on the part of Mr. *M'Combe*, who should not, I apprehend, allow a moment to be lost in procuring and acting under good

advice. It is quite unnecessary, however, for me to answer Mr. M'Combe's letter, as I can say nothing further than the above."

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On the 14th of October Mr. Crawford wrote as follows:

"DEAR SIR,—I have received your's in reply to my last letter, written to you on the subject of Mr. M'Combe's expected renewal from Mr. Bond, upon which I wrote to Mr. M'Combe, enclosing a copy of your letter, previous to the receipt of which I really thought that you had been acquainted with all the circumstances in connexion with the fund (being Mrs. M'Combe's fortune), out of which the arrears of rent and renewal fines are to be paid. It appears to me that Mr. M'Combe has not been so active as he ought in his own affairs. I consider that Mr. Bond has, or that you, as his solicitor, have a right to be paid any reasonable costs which either have already or may hereafter be incurred in connexion with this renewal, and I shall be obliged by your informing me of what they consist, or at least their probable amount."

On the 21st of October, Mr. Dobbin replied:

"DEAR SIR,—The costs hitherto incurred in the above matter amount to between 35*l.* and 40*l.*

"We are, &c. &c.

"LEONARD DOBBIN & CO.

"M'Geough with M'Combe."

The next letter offered in evidence was one from Mr. L. Dobbin to Mr. Crawford, of the 21st of May, 1838.

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“DEAR SIR,—Mr. *Bond* long since stated that he considered Mr. *M'Combe* had no right to the renewal claimed. I so informed Mr. *M'Combe* and you, and I have had no further instructions from Mr. *Bond* on the subject.

“I remain, &c. &c.

“L. DOBBIN.”

There were two subsequent letters from Mr. *Dobbin* to Mr. *M'Combe* and *Crawford* in the year 1839, to the effect, “that Mr. *Bond* was determined not to renew in consequence of Mr. *M'Combe's* inattention to the various applications and notices given him many years since.”

Argument.

Mr. Serjeant *Keatinge*, Mr. *Gilmore*, Mr. *William Brooke*, and Mr. *F. Goold*, for the Plaintiffs.

The Defendant is principally answerable for the delay in this cause: it cannot certainly be imputed to the Plaintiffs. In the first place, the Plaintiffs were ignorant of the time when the *cestui que vie* died: he was one of the members of the landlord's family, and died abroad at a very early age; even at the period when the marriage settlement was executed, the parties themselves were but little acquainted with the state of the property: the three lives are represented to have been then in existence, and the Christian name of one is misstated. Repeated applications were made to the Defendant for information as to the time when the life dropped, but without success; it was not discovered until the year 1839, and then principally in consequence of the exertions of the Plaintiffs' solicitor: since that time there has been no laches sufficient to work a forfeiture. It will be said that the notice in 1822, served by the Defen-

Plaintiff, informed the parties of the fact of the fall of the
 life. That notice, however, only stated that *Joseph John*
M'Geough had "long since departed this life;" it did not
 specify the time, so as to enable the parties to calculate the
 renewal fines and interest; but if it even were more explicit
 than it is, it was not a notice to the trustees, the parties
 who had the legal estate, and who were interested in pre-
 serving the property for the wife of *A. M'Combe*, and his
 minor children: it was addressed only to *A. M'Combe*, who
 had merely a life estate in the lands, and from whom the
 fund applicable to pay the renewal fines was not to proceed.
 Again, the notice itself has been since repeatedly waived,
 and the fair inference from all the dealings of the parties
 has been to lead the Plaintiffs to suppose, that the Defen-
 dant did not mean to rely upon the forfeiture. Under all
 these circumstances, and bearing in recollection the manner
 in which the property to pay the fines—the lady's fortune—
 was situated, and the difficulties in the way of drawing
 it out of Court, for the purposes for which it was required,
 the Court will give the Plaintiffs the relief which they
 seek.

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The following cases were cited: *Jackson v. Saunders*(a),
Eaton v. Lyon(b), *Firman v. Lord Ormonde*(c), *Harries*
v. Bryant(d), *Baldwin v. Bridges*(e), *Wallace v. Patten*(f),
The Earl of Mountnorris v. White(g), *Deane v. The Mar-*
quis of Waterford(h), *Barrett v. Burke*(i).

(a) 1 Sch. & L. 443.

(b) 3 Ves. 690.

(c) Beatty, 347.

(d) 4 Russ. 89.

(e) Lloyd & G. temp. Plunket, 408.

(f) 1 Ir. Eq. R. 338.

(g) 2 Dow, 459.

(h) 1 Sch. & L. 451(n).

(i) 5 Dow, 1.

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Argument.

Mr. Serjeant *Warren*, Mr. *Tombe*, and Mr. *S. B. Miller*,
for the Defendant.

This is a clear case for refusing a renewal. The forfeiture was incurred so far back as the year 1823; at that time, Mr. *M^cCombe* was distinctly informed of the fall of the life, and required to renew: he was personally served with a formal notice, and a draft of a renewal was furnished. To this no attention was paid, and no step appears to have been taken, upon his part, until the month of August, in the year 1829. To the application then made, the landlord's agent replied, that the forfeiture had accrued, and that the renewal would not be granted. Subsequently, however, from motives of kindness, the landlord agreed to waive his rights, and execute a renewal; but it was upon one express condition, that this renewal should be "immediately arranged:" nothing, however, was done: once more, in 1836, the Defendant appears to have been again willing to renew; but the parties were still careless: the intermediate time, from 1833 to 1839, was occupied with an ineffectual correspondence and fruitless references to the Master in the cause, to the credit of which the fortune of Mrs. *M^cCombe* was lodged, to inquire as to the amount due for renewal fines and interest; until at last, the Defendant, wearied out by the repeated inattention to the various offers on his part, now positively refuses to renew. It is said, on the part of the Plaintiffs, that they are the trustees of the settlement, and have the legal estate; and that, consequently, as they have received no notice, requiring them to renew,—the communications on the subject being altogether with Mr. *M^cCombe*, the tenant for life,—that they have not been in any default, and are, therefore, entitled to rely upon their strict rights. But in the first place, when the notice in 1823 was served, Mr.

M^cCombe was the absolute owner of the property : he was then unmarried, and the settlement was not executed until the 2nd of September, 1824 : the forfeiture was then incurred ; and if the want of formal notice to the trustees be now insisted upon on their part, the Defendant will, in all fairness, be entitled to say, that the forfeiture which had accrued prior to their acquiring any interest in the estate, has never been waived by anything, that has occurred between him and the trustees. But in truth it is idle for the Plaintiffs here to rely upon a mere technicality of this kind : it is perfectly clear, that all the communications that passed reached the hands of the trustees, or those concerned for them. *Mr. Crawford*, who is now their solicitor upon record, appears to have been the principal correspondent on the tenant's side : and the trustees are now just as responsible for the delay and neglect as the tenant for life, *Mr. M^cCombe*. *The Earl of Mountnorris v. White(a)*, and *Butler v. The Earl of Portarlington(b)*, were the only cases referred to.

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THE LORD CHANCELLOR :—

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This bill is filed by trustees, who have the legal estate in a lease for lives, with a covenant for renewal, in order to obtain a renewal of that lease. The last renewal was in 1801. The life in question dropped in 1802 ; a period, therefore, of more than forty years has elapsed, although, according to the terms of the contract, a renewal should have been obtained within nine months after the dropping of the life. No doubt, a case for relief might be made out

(a) 2 Dow, 459.

(b) Ante, vol. i. p. 20.

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notwithstanding the great length of time ; and particularly in this country, under the Tenantry Act^(a), time may have been waived, or there may not have been such wilful neglect as to deprive the tenant of the equitable right of renewal. The present case, however, is not one of that kind.

It appears that in 1824 Mr. *M'Combe*, the lessee, married, and on that occasion his estate was settled to certain uses. In the settlement, which was not very accurately drawn, he is described as holding the lands in question for three lives ; but the Christian name of one of the lives is not correctly stated, a blank is left for the Christian name of another. The whole legal estate, however, was vested in trustees, upon trust, in the first place, to pay the head rent and renewal fines as the same should become payable, and then to permit the lessee to take the residue for his life, with remainder, subject to an annuity for the intended wife in case she survived him, upon certain trusts for the issue of the marriage, which I need not particularly advert to. It has been proved in the cause, that about two years before that marriage, though there had been no renewal for the period of nineteen years, Mr. *Bond*, the lessor, was willing to renew, and certain steps for that purpose were taken. A renewed lease was prepared, but while the negotiations were on foot, by some accident, or through some neglect, no renewal actually took place, and all communication on the subject suddenly dropped. After the marriage, the young lady having been a ward of Court, and some of her property being still in Court, the parties, instead of endeavouring to execute the trusts of the settle-

(a) 19 & 20 Geo. III. c. 30.

ment of 1824, which provided that the trustees should be suffered to apply all the rents to the payment of the landlord's rent and the renewal fines, went to work in a different manner, behind the back of the lessor, in order to obtain the young lady's money out of Court, and to apply it in discharge of the husband's obligations. The Master, to whom the matter was referred, in 1827, reported that some life or lives, for which the lands were held had dropped, and that it would be for the benefit of the lady, as her jointure was charged upon these lands, that the lease should be renewed. Now all this shews that the parties did not know the state of the property. They could not inform the Master, which of the *cestui que vies* were dead, and which were in existence; and it also proves that those proceedings were taken behind the back, and without the knowledge, of the lessor. In that state of things the delay in renewing was such as, beyond all doubt, put an end to the right of the lessee. If, therefore, I should be of opinion that the time was again open, yet by this laches the time was once more closed against the tenant, and he lost altogether his right of renewal.

But it is said that the Plaintiffs, the trustees, stand in a different relation to the landlord, that they were ignorant of the transactions which had taken place, that they represent the children of the marriage, and a lady, who was a minor at the time of her marriage, and a ward of this Court, and that they are solely interested in protecting the children and guarding their rights; that though, perhaps, *M^r Combe's* right would be barred, nevertheless they have an equity, which I am bound to sustain. I wholly disagree with this view, for it was the duty of the trustees to have made full inquiry, and the property was such as was calcu-

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lated to put them upon inquiry. They were bound to appropriate the rents in discharge of the trusts of the settlement, of which they were the responsible agents. A more unfavourable case I have seldom seen. During all these years, during the various applications made, and the course of the proceedings to obtain the property of the minor out of Court, it never suggested itself to any of the parties to tell the Plaintiffs that they had in their own hands a fund to meet the expenses of a renewal, and that it was a duty and obligation imposed on them to pay the renewal fines out of the rents and profits of the estate, and thus to protect the interests of the wife and children. The trustees allowed Mr. *M^cCombe* to receive the rents, and neglected to perform the obligations of the settlement, and they, who are responsible for this breach of trust, now endeavour, by means of the present suit, to relieve themselves from that obligation.

The matter would not admit of a moment's discussion, if, in 1833, Mr. *Dobbin*, who was the solicitor for the lessor, had not offered to open the time for granting a renewal. There was in that year no title in the lessee to enforce a renewal, but there was then a clear and distinct waiver of the forfeiture on the part of the landlord's agent. Before, however, I enter upon this branch of the case, I may refer to the transaction of 1829, at which period, and after there was an end to any right of renewal, Mr. *Crawford*, as solicitor for minors, addressed a letter to the Defendant, in which, after mentioning that he was very imperfectly informed respecting the property, he asked for a long detail of information, and stated that the money to pay the arrears of rent and renewal fines was in Court; and it is now a subject of complaint at the bar that the information,

by which he required, was not given. But the letter in reply
and which the counsel for the Plaintiffs have most care-
fully abstained from alluding to, both in their opening and
in the reply), that most important letter of the 31st of August,
1829, says, we deny altogether your right to a renewal,
for you have lost it by your neglect. It would, there-
fore, have been inconsistent to have given the information,
which was required for the purpose of enabling the party
to obtain the renewal, the right to which was denied by
the individual, to whom the letter was addressed.

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In 1833, Mr. Bond, with great kindness on his part, and
I must say that all through he appears to have acted with
the utmost fairness, relented. He declared his willingness
to renew; but there was this condition attached to the favour,
namely, that the renewals should be immediately prepared,
and the whole matter at once arranged. Mr. Dobbin, in his
letter, says, Mr. Bond this day authorized me to approve
of your renewals, provided they are immediately arranged ;"
and he concludes his letter, with these most important words,
" Do not neglect this any longer:" so that here was an
express condition imposed ; and a warning was given to
the lessee not to be guilty of any further neglect. Up to
that time, thirty-one years had elapsed since the dropping
of the life. The situation, in which the parties were then
placed, was plain enough ; the time was opened again ; but
it was upon the condition that there should be no further
delay ; and I trust that no one will attempt to argue, that, if
a party has lost his right to a renewal, and the lessor, who is
no longer bound, says, " I will consent to renew, but upon
the terms of your acting promptly, and at once taking ad-
vantage of the offer"—this is a general waiver, and that the

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defaulting party may commence again a new race for another thirty years. That is not the law of this Court. To make the waiver effective, the terms upon which it is tendered ought to be complied with, and he, who accepts the offer, must in every respect fulfil the condition, by which it is accompanied.

It was much pressed in argument, that as all the dealings and negotiations, which took place, occurred with *M^cCombe* alone, the Court would not allow the rights of the children to be prejudiced by his neglect; because *M^cCombe*, being a *cestui que vie* in the renewal of 1801, which would therefore last for his own time, had no interest in the renewal, and was a mere stranger. But this argument is founded on a misapprehension. He is liable to make good to the trustees, any loss which they may sustain in consequence of their breach of trust. He was a party under the settlement, and has wrongfully received the rents, and the rights of his children are involved. It is therefore a mistake to argue that he is not deeply interested. It is impossible to say that there was anything like concealment on the part of Mr. *Bond*, or Mr. *Dobbin*, acting on his behalf; they wrote either to Mr. *Crawford*, or to Mr. *M^cCombe*, and it is certain that all the communications to Mr. *M^cCombe* reached the hand of *Crawford*. It is plain that Mr. *Bond* acted *bonâ fide*, with the intention of conferring a benefit. The result of the case, in 1833, was, that the forms of preparing a renewal were observed (there was some misapprehension as to what had become of the actual draft); but after some steps had been taken, they became ineffectual: no renewal was ever obtained, and I must say that this has arisen from the neglect of those, who might have obtained the renewal, had they been moderately active.

I have been hitherto referring to the proceedings down to the year 1833 : after that period, on the part of the lessee, everything was permitted to remain dormant, until, in the early part of 1836, Mr. *Dobbin* wrote another letter, in answer to an application again made, in which he says, addressing himself to Mr. *M^cCombe*, that he is not authorized to open the time again, or to avoid the forfeiture ; but that Mr. *Bond* was so well disposed, that he should not be surprised if he was even still willing to renew, provided there was no further delay. In 1833, when the time for renewing was opened, one year's rent was due. When Mr. *M^cWatty* wrote to Mr. *Crawford* in August, 1834, there were two years' rent due ; and *M^cWatty* wrote to him to that effect, and said, let me have it in the next week. With respect to the renewal, he says, that he could form no opinion upon it, until he saw the original lease. In answer to that Mr. *Crawford* said, I have no money in my hands ; the funds, applicable for the purpose, consist of the fortune of Mrs. *M^cCombe*, and they are in Court, and will not be parted with until the renewal is executed. Now that letter satisfies me that he was anxious to impose, as a condition upon Mr. *Bond*, the renewal of the lease, if he expected to get his rent. He would get an order to pay both rent and renewal fines, if the renewal took place. Then came the transaction of 1836. There was no waiver then on the part of the lessor ; but he, and those acting for him, held out as a favour that a renewal would be granted, provided no further time was lost. The result was, that certain steps were taken, but they amount to nothing ; the correspondence shews that nothing effectual was attempted to be done ; and *Crawford*, in his letter of the 14th of October, 1836, states, that “ it appears to him that Mr. *M^cCombe* has not been so active in his own affairs, as he ought to have been ;” thus shewing

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that he thought *M^cCombe* ought to have interfered in the matter of this renewal ; and then he adds, “ I consider that *Mr. Bond* has, or that you, as his solicitor, have a right to be paid any reasonable costs, which either have already or may hereafter be incurred in connexion with this renewal ; and I shall be obliged by your informing me, of what they consist, or at least their probable amount.” *Mr. Dobbin* replies to this, and states the probable amount of those costs to be between 35*l.* and 40*l.* The letter of the 21st of October never could be said to have opened the transaction. Previously to this, on the 3rd of October, *Mr. Dobbin* had expressly said, I have no authority to open the matter again. I am of opinion that the time is closed ; but then he adds, I should not, however, be surprised if even still *Mr. Bond* would relent, and grant you a renewal ; but then there must be no further delay : and after that it is, that *Mr. Crawford* writes to inquire, what is the amount of the costs, which *Mr. Bond's* solicitor has incurred ? Is not that an answer to the argument, which has been so much relied upon at the bar, that there was a want of information on the part of *Mr. Crawford* ? *Mr. Crawford*, it is said, was ignorant of what renewal fines were due, and when the lives had fallen ; but he merely inquires what was due for costs, and not one word does he say about the time when the life dropped, or about the amount of renewal fines. I am bound to believe that *Mr. Crawford* was, at that time, master of all the information which was required upon the subject, except what he wrote to inquire about, the amount of the costs then due ; and the letter of *Mr. Dobbin*, in reply, did not carry the matter beyond that. But if I assume, in order to try the question, that the time was opened again by this letter of 1836, I should be of opinion that there was not a single hour to be lost upon the part of the Plaintiffs,

for Mr. *M^cCombe*, in taking advantage of this indulgence on the part of the landlord ; not a delay of weeks, much less of months, and many months too, without a step having been taken, or the slightest attempt, to obtain the renewal. Not a single step was taken in the year 1837. The rent was withheld, and no fine was paid. Is it the law of this Court, that a lessee, after having thus disregarded the repeated offers of his landlord, can be permitted to file a bill against him for a renewal ?

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As to the money of the lady, I do not know how it could be got out of this Court. What pretence was there to apply the lady's fortune in discharge of the husband's obligation ? Would the Court give this money to relieve the husband from his obligation, and more particularly when, by the very terms of the marriage settlement, there was a fund provided for the renewals ?

The whole of the year 1837 is unaccounted for. It is impossible to doubt that there was an end of the right of renewal ; but in 1838 the parties became alarmed ; they became active. In 1839, a notice was served, at the suggestion of the late Master of the Rolls, upon the Defendant and his solicitor, calling for information connected with the renewal. The reply of Mr. *Dobbin* is, that the right is gone, and that the landlord is determined not to renew in consequence of Mr. *M^cCombe's* inattention to all his former applications ; and subsequently when the amount ascertained to be due for arrears of rent and renewal fines was lodged at Mr. *Bond's* bankers, the credit was rejected. It is singular, after all the complaints on the part of the lessee, and his solicitor, of the want of knowledge, as to the time when the life or lives dropped, that the moment they set about

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the matter in earnest, when they find the danger they are in, they then, without any aid from Mr. *Bond*, supply all the knowledge which was required, the not having which is now attempted to be set up as an excuse for the delay: the Master is informed when the life died; the amount of the rent in arrear is ascertained; the sum due for renewal fines is discovered; and a sum composed of these items is deducted from the lady's fortune, and lodged with his bankers to the credit of the landlord: but which credit, as I have already stated, the landlord at once rejected. The parties found no difficulty in ascertaining the required facts, the instant they exercised due diligence; but I should do injustice to Mr. *Bond*, if I did not state my conviction, that if he had been asked at any time for information, he would have given it without a moment's delay. Throughout the transaction, there was no shrinking on the part of Mr. *Bond*, or those acting on his behalf, from any obligation he was liable to perform: still more, though under no legal or equitable obligation to open the time in 1833, he consented to do so, and Mr. *Dobbin* pressed Mr. *M^cCombe* to take immediate advantage of the offer: he said, "mind you lose no more time." Can any one believe, that if Mr. *M^cCombe* or *Crawford* had then inquired when the life dropped, he would not have been immediately informed?

I have never seen a case in which so much kindness has been displayed by a landlord, and so much readiness shewn to waive his strict legal rights, or in which a tenant has been guilty of grosser laches. The bill must be dismissed with costs.

TABUTEAU v. WARBURTON.

1843.

ON a motion in this cause, on the part of two of the Defendants, which was refused, Mr. *Hunter* appeared for another Defendant in the cause, who had been served with notice, having no interest in the motion, and applied for the costs of the appearance.

May 11:
A party served with a notice of motion, though not interested in the subject-matter of the motion, is yet entitled to the costs of appearing.

Mr. *William Brooke* submitted that this Defendant, not having any interest in the matter of the motion, ought not to have appeared.

The LORD CHANCELLOR held that he was entitled to costs; observing, that where a party was served with notice, he was not bound to take upon himself the responsibility of deciding whether his interest was such as to render it unnecessary for him to appear; and that if, in consequence of the notice, he did appear, he ought to be indemnified for the expense, which he had thereby incurred(a).

(a) See *Heneage v. Aikin*, 1 Jac. Beames on Costs, 161, n.; *Ex parte* & W. 377; *Bamford v. Watts*, 2 *Townsend*, 2 Moll. 242, n. Beav. 201; *Nicholson v. Foster*,

WHITLA v. HALLIDAY.

THIS was a bill to foreclose a mortgage, granted to the Plaintiff, by deed bearing date the 22nd of October, 1836.

May 12.
In a suit by a prior mortgagee for a foreclosure

and sale, the heir of the mortgagee of the equity of redemption is not a necessary party.

It is not imperative upon the Plaintiff, under the 47th General Order, to set down the cause to be heard upon an objection for want of parties. If the objection be untenable, he may disregard it.

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—
Argument.

The mortgaged premises were freehold. The legal estate was in the Plaintiff, the mortgagee. The mortgage, by deed, bearing date the 10th of July, 1837, granted his equity of redemption to *Robert Halliday*, to secure the payment of a sum of 4000*l.*

Robert Halliday was dead, and his executors, by their answer, insisted that *George Halliday*, the heir of *Robert Halliday*, was a necessary party to the suit.

The cause was set down by the Plaintiff, upon the Defendant's objection for want of parties, under the 47th General Order(a).

Mr. *William Brooke* and Mr. *Burroughs* for the Plaintiff

If the deceased mortgagee had been seised of the legal estate, his heir would clearly be a necessary party, in order to convey the estate, *Scott v. Nicoll*(b); but here the legal estate is in the Plaintiff, and the heir of *Robert Halliday* is at most no more than the trustee of an equity, and therefore ought not to be brought before the Court, *Head v. Lord*

(a) " That when the Defendant shall, by his answer, suggest that the bill is defective for want of parties, the Plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only: and the purpose, for which the same is so set down, shall be notified in the docket to be lodged with the Registrar, in the form, or to the effect following, that is to say, ' Set down upon the Defendant's objection for want of parties: ' and

that when the Plaintiff shall not set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the Defendant's objection shall then be allowed, be entitled as of course, to an order for liberty to amend his bill, by adding parties; but the Court, if it thinks fit, shall be at liberty to dismiss the bill."—*General Order*, xlvii.

(b) 3 Russ. 476.

Teynham(a). It does not appear, however, to have been the subject of express decision, whether or not the heir of a deceased mortgagee of freehold property, who had not the legal estate, is a necessary party.

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 ———
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 ———
Argument.

Mr. Moore and Mr. Vance for the Defendants.

The answer in this case was prepared before the new rules had come into operation: according to the old practice a Defendant made, by answer, every objection that occurred to the pleader, and the Plaintiff either amended his bill, or disregarded the objection, as he thought fit. In this case, the objection, for want of parties made by the answer, is, we admit, unfounded; and would not have been made, had the counsel, who prepared the answer, been aware at the time of this rule.

THE LORD CHANCELLOR:—

Judgment.

It is not absolutely necessary to set down the cause to be heard upon an objection of this nature. It is true, that now, since the General Rule, which is a highly beneficial one, the Court will be very unwilling to listen to a question of parties at the hearing of the cause: but if the objection be one, which is altogether without foundation, I do not see why the Plaintiff may not disregard it. This case is somewhat peculiar; for though the objection, which was taken by the answer, is now abandoned at the bar, yet, it is admitted, that there is no express case upon the point. I shall give no costs against the party making the objection; but declare that *George Halliday*, the heir-at-law of the deceased mortgagee, is not a necessary party, and let the

(a) 1 Cox, 57.

1843. Plaintiff have his costs of this hearing as costs in the
 WHITLA cause(a).
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Judgment.

Declare that *George Halliday*, the heir-at-law of *Robert Halliday*, in the bill named, is not a necessary party to this suit; and let the Plaintiff have his costs of this hearing, a part of his costs in this cause.

Reg. Lib. 87, fol. 390, 1843 —

(a) See the following cases, *Richardson v. Larpent*, 2 Young & C., C.C. 507; *Bradstock v. Whatley*, 6 Beav. 451: see also *Iris Osborne v. Foreman*, 2 Hare, 656; *Equity Pleader*, 303. *Kershaw v. Clegg*, 1 Phillips, 120;

IN THE MATTER OF BISHOP GORE'S CHARITY.

May 25.
 A testator, in the year 1690, by his will devised and bequeathed certain properties therein mentioned for charitable purposes, but without naming any trustee or devisee. From the death of the testator to the present time the property was applied upon the trusts in the will specified. Upon a petition presented under the Statutes 52 Geo. III. c. 101, and 1 Will. IV. c. 60, stating such facts, and that the heir of the testator could not be discovered, the Court made an order referring it to the Master to appoint new trustees and to approve of a proper person in the place of the heir of the testator to convey to such new trustees.

THIS was a petition presented on the part of *William P. Mathews*, secretary to the Commissioners of Charitable Donations, and *William J. M'Causland*, by and on behalf of the said Commissioners, praying that it might be referred to one of the Masters to settle and approve of a proper scheme for the management and application of the charitable funds in the petition mentioned, and to inquire whether any and what proceedings should be taken to enforce the recovery thereof; and that, in pursuance of the provisions of the 52 Geo. III. c. 101, and 1 Will. IV. c. 60, some fit and proper persons, to be approved of by the Master, might be appointed trustees of said charitable funds, and that

Some person might be appointed to convey said charitable funds to said trustees, when so appointed or approved of.

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 TER OF BISHOP
 GORE'S CHA-
 RITY.
 Statement.

It appeared, from the petition, that Dr. *Hugh Gore*, formerly Bishop of Waterford and Lismore, had, by his last will and testament, bearing date the 13th of October, 1690, after several bequests therein mentioned, bequeathed and disposed of certain impropriate tithes, of which he was seised in his own right, together with all the rest of his estates, real and personal, towards the building and repairing of old ruined churches within the diocese of Waterford and Lismore; and that he appointed three executors of his said will, who duly proved the same; that no person was specially named in said will as trustee or devisee of said properties so devised; but that from time to time the several successive Bishops of the said diocese, for the time being, had constantly and regularly received the profits thereof, and applied the same towards the charitable purpose directed by the said will; that by the provisions of the Church Temporalities Act^(a) the Bishoprics of Waterford and Lismore were united to the Bishopric of Cashel, and the lands, &c. belonging thereto, were transferred to Ecclesiastical Commissioners. The petition then stated that difficulties had arisen with respect to the management of the property, by reason of there having been no trustee named in the said will, nor any legal appointment of the Bishops of Waterford and Lismore, as trustees of said charity. That search had been made to ascertain who the heir-at-law of the said *Hugh Gore* was, but without effect; and the petition referred to the proceedings in a certain cause in the Court of Chancery, instituted in the year 1743, wherein it was stated that the said *Hugh Gore* had died without leaving any relation or heir-at-law that had ever been heard of.

(a) 3 & 4 Will. IV. c. 37.

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TER OF BISHOP
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RITY.

Argument.

The *Solicitor-General* moved the prayer of the petition.

Under the Statute 52 Geo. III. c. 101, the Court has jurisdiction to act by petition in cases of charities, and the Statute 1 Will. IV. c. 60, supplies the Court with still more extensive powers, both in cases of mere charity and of trust. In this case the devise created a trust, and the heir of the testator consequently became a trustee; the Court will, therefore, send the case to the Master to approve of new trustees for the purposes of the will; and, as the heir of the testator, the constructive trustee, cannot now be discovered, will, under the 23rd section of the later Statute, appoint a person to convey in the place of such unknown trustee.

The LORD CHANCELLOR made the following Order:—

Order.

Refer it to the Master to settle and approve of a proper scheme for the management and due application of the charitable funds in the pleadings mentioned; and let the Master inquire and report whether any and what proceedings, and against whom, should be taken, to enforce the recovery of the arrears of such charitable funds; and let the said Master approve of such number of fit and proper persons as he shall deem necessary to be trustees of the said charitable funds and premises; and of some fit person, to be appointed in the place of the heir of the said Dr. *Hugh Gore*, deceased, formerly Bishop of Waterford and Lismore, to convey the said charitable funds and premises to such new trustees as shall be appointed of the said charitable funds; and let the Master tax the costs of the petitioners, and reserve payment thereof, and further order, until the return of the Master's report.

Reg. Lib. fol. 37, 1843 -

CRAWFORD v. SCOTT.

1843.

May 26.

MR. Serjeant *Warren*, on the part of the Defendant, *James O' Sullivan*, moved that the answer purporting to be the answer of *James O' Sullivan*, and *Catherine*, his wife, should be taken off the file, and that the Defendant might be at liberty to file such answer to the Plaintiffs' bill as he might be advised ; or that the said Defendant, *James O' Sullivan*, might be at liberty to file a supplemental answer thereto, and that the hearing of the cause should be postponed accordingly.

Where a motion is properly moveable at the Rolls, it ought to be moved there, even though, if granted, it will have the effect of postponing a cause in the Lord Chancellor's list of causes for hearing.

The LORD CHANCELLOR inquired why this matter had not been moved at the Rolls ?

Mr. Serjeant *Warren* stated that, according to the practice, a motion would not be entertained at the Rolls, the effect of which, if granted, would be to postpone a cause, which was in the Term list of causes for hearing.

The LORD CHANCELLOR said that such practice was very inconvenient, and tended only to embarrass the paper ; that as such had been considered to be the practice, he would hear the present motion, but that in future such motions, according to the ordinary rule, should be heard at the Rolls(a).

(a) Accordingly, in *Metcalfe v. Atkinson*, May, 1844, an application to stay proceedings in an original cause, until the bill in the cross cause should be answered, was remitted to the Rolls.

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MILLIKEN v. KIDD.

May 29, 30.

Upon the purchase of an annuity granted for two lives and the life of the survivor, and made redeemable upon six months' notice, a policy of insurance, which had been effected upon the life of one of the grantors, was assigned to the annuitant, and was subsequently kept up by her at her own expense. The life having dropped, the Company paid the amount of the insurance to the annuitant. The annuity having subsequently fallen into arrear, upon a bill filed by the annuitant to raise the arrears:—*Held*, that the annuitant was not bound to give credit for the amount received on foot of the policy, as against the arrears of the annuity; but was entitled to retain same as compensation for the diminution in value of the annuity.

BY indenture, bearing date the 28th of February, 1835, and made between *Richard Kidd*, of the first part; *George Kidd*, of the second part; *John Douglass Johnstone*, of the third part; and *William O'Beirne*, of the fourth part—after reciting the title of *Richard Kidd* and *George Kidd* to certain premises therein set forth, and that by indenture, bearing date the 10th of April, 1833, the said *Richard Kidd* had, in consideration of the sum of 460*l.*, granted to the said *John D. Johnstone* an annuity of 61*l.* for the life of the said *George Kidd*: and that by a further deed of the 15th of January, 1834, *Richard Kidd* and *George Kidd* had granted unto the said *John D. Johnstone* an annuity of 33*l.* per annum, in addition to the former annuity of 61*l.*, to be paid during the lives of the said *Richard* and *George Kidd*: and after further reciting an agreement that *Richard Kidd* and *George Kidd* should grant an additional annuity of 6*l.*: it was witnessed, that in pursuance of said agreement, and for the considerations therein mentioned, the said *Richard Kidd* and *George Kidd* did grant unto the said *John D. Johnstone* the three said several annuities of 66*l.*, 33*l.*, and 6*l.*, amounting in the whole to the sum of 100*l.*, for the lives of the said *Richard Kidd* and *George Kidd*, and the survivor of them; and thereby covenanted to pay said annuities for and during the term for which same were granted. And the said deed further witnessed, that for the better securing the payment of the said annuities, the said *Richard Kidd* and *George Kidd* demised unto the said *William O'Beirne* all the premises therein particularly mentioned, to hold for the term of ninety-nine years,

pon trust to receive the rents of said premises, and apply the same, in the first instance, in discharge of the head-
rent of the premises, and then in payment of the said annuities, at the times and in the manner therein mentioned :
and the deed contained a power of repurchase, on the part of *Richard Kidd* and *George Kidd*, upon giving six months' notice in writing to the said *John D. Johnstone*, of their intention so to do.

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Statement.

By indenture of the 4th of January, 1836, *John D. Johnstone*, in consideration of 900*l.*, assigned said annuities to *Mrs. Anne Milliken* ; and by the said deed, *William O'Beirne*, with the consent of *Johnstone*, assigned the said term of ninety-nine years to *Andrew Milliken*, in trust for the said *Anne Milliken*.

The bill in the present cause was filed on the 12th of April, 1842, by *Mrs. Anne Milliken* and her trustee, *Andrew Milliken* ; it stated that *Richard Kidd* had died in the month of June, 1840, intestate, and without issue ; that *George Kidd*, who was the only Defendant, was still alive, and that there was an arrear due upon foot of the annuities, amounting to the sum of 120*l.* 3*s.* 1*d.*, up to the 25th of March, 1842.

The bill prayed, that the three several annuities, amounting in the whole to the sum of 100*l.*, might be decreed to be well charged upon the premises therein mentioned ; that an account might be taken of what was due on foot of the said annuity, and for payment thereof, and for a receiver ; and that such receiver might be decreed, out of the rents and profits, to pay the said arrears, and keep down the accruing

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gales of the annuity, as the same might thereafter become due and payable.

The Defendant, *George Kidd*, by his answer, stated that *George Kidd*, who was the father of the Defendant, as well as of *Richard Kidd*, had by his will devised the premises, which were chargeable with the annuity, to *Richard Kidd*, for his life, and after his decease, in case of his dying unmarried, or without leaving a wife or child living at the time of his death, to the testator's surviving sons: that *Richard Kidd*, some time in the year 1830, applied to a Mr. *Daniel Brady* for an advance of 200*l.* upon an annuity charged upon the premises bequeathed by the will of his father, *George Kidd*, which *Brady* agreed to grant, but required an insurance for such sum, to be procured upon the life of said *Richard Kidd*; and that said insurance was accordingly effected in the name of *Brady*, but at the expense of *Richard Kidd* himself. The Defendant further stated, that upon the occasion of the execution of the deed of the 10th of April, 1833, it was agreed that *John D. Johnstone* should retain, out of the consideration money for the annuity then granted by *Richard Kidd* to *Johnstone*, sufficient to pay off *Brady*; which he accordingly did, and obtained an assignment of said policy of insurance, by deed of the 13th of April, 1833, in part security for the sum advanced by him on foot of said annuity: that of the further sums, which were advanced by *Johnstone* to *Richard Kidd*, and which were secured by the deeds of January, 1834, and February, 1835, he, the Defendant, *George Kidd*, had never received a shilling, and that he was a mere surety in the transaction for his brother, *Richard Kidd*: that upon the execution of the assignment of the 4th of January, 1836, the said policy of insurance was assigned

the Plaintiff, *Anne Milliken*, by a contemporaneous deed, and that upon or since the death of *Richard Kidd*, the said *Anne Milliken* had received the full amount of the policy from the Insurance Office : and the Defendant submitted that the Plaintiff, *Anne Milliken*, was bound to give credit for the amount thereof out of the sum which should be found to be due upon foot of the annuity.

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Statement.

Mr. Serjeant *Warren*, Mr. Serjeant *Keatinge*, and Mr. *Burroughs*, for the Plaintiffs.

Argument.

There is no foundation for the equity which the Defendant seeks to establish in this case. The annuitant was not under any obligation to keep up the insurance; but solely, of her own accord, and at her own expense, she thought proper to maintain it; and she is, therefore, clearly entitled to reap the benefit of what was thus her voluntary act. *Godsall v. Boldero(a)*, no doubt, establishes that a contract of this kind is in its nature a contract of indemnity; but that case was decided upon a Statute(b) which is not in force in this country. All the cases upon this subject were much considered in the case of *Humphrey v. Arabin(c)*, the converse of the case now before the Court, where it was held that a judgment creditor, who had insured the life of his debtor, and had received the amount from the Insurance Office, could not, in a foreclosure suit by a mortgagee, whose security was subject to the judgment, be obliged to set off against the debt the sum so received by him under the insurance. The peculiarity of the present case arises from the fact of the annuity being still continuing. But even supposing that the

(a) 9 East, 72.

(c) Lloyd & G. temp. Plunket, 318.

(b) 14 Geo. III. c. 48.

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defence which is relied upon here was sustainable, it could not be set up without a cross bill.

Mr. *Corballis* and Mr. *Loughnane*, for the Defendant.

The insurance in this case, which was originally effected on the occasion of the loan by *Brady*, was obtained at the expense of *Richard Kidd* himself; and upon the repayment of that loan, it became the absolute property of *Richard Kidd*; and though assigned by him to *Johnstone*, yet it was only as an additional security, to protect the annuitant; a mere contract of indemnity. The case of *Phillips v. Eastwood*(a), decided by your Lordship, furnishes the principle, by which this case is to be governed. *Ex parte Andrews*(b) goes still further; there a sum of money, which was payable on the contingency of *A.* surviving *B.*, was assigned to secure a debt due by the debtor. The assignee, out of his own funds, having insured the life of *Sir Thomas Plumer* held, that the sums received under insurance should be brought into the account. If insurance in this case had been effected for the whole amount of the sum paid for the annuity, is it not that upon payment under the insurance, the annuity would be extinguished? It is to be remembered also, that the annuity is, by the express provisions of the deed, redeemable, upon giving six months' notice. Suppose the Defendant were now to offer to redeem, could it be said that the sum thus received by the Plaintiff was not taken into the account, and held to be a part of the sum paid for the redemption?

(a) *Lloyd & G. temp. Sugden*, 270. (b) *2 Rose*, 410.

H LORD CHANCELLOR :—

must look through the deeds before I decide this point. I do not apprehend that there is any great difficulty in it. The case of *Phillips v. Eastwood*(a), as I recollect it, was an annuity transaction, which had been turned into a loan ;

I considered the policy as one of the securities for the loan, and held that it was a debt due to the party who had advanced the money. This is rather a singular transaction.

Richard Kidd granted an annuity to *Brady*, in the common form, for his own life, and an insurance was effected upon *Brady's* life, for the sum of 200*l.* Afterwards, *Kidd* re-purchased the annuity, and the policy was treated, both in the instrument securing the annuity, and also upon the redemption, as being mere security for the sum, for which the annuity had been granted, and it was accordingly transferred to *Kidd* himself.

Now, in the ordinary course of business, when the grantor grants an annuity, not being under any obligation to keep up an insurance upon the life of the grantor, does in point of fact insure, the policy belongs to the grantee, because he pays the premium, which, to that extent, diminishes the annuity. In this case, the policy appears to me to have been treated as a security for the annuity, or rather for the consideration money.

The transaction of 1833 followed, when *Richard Kidd* granted an annuity of 61*l.* to Mr. *Johnstone*, for the life of *George Kidd*, and on that occasion he assigned to *Johnstone* a policy of insurance on his own life for 200*l.*, which, I have already stated, had been transferred to him when he re-purchased the annuity granted to *Brady*. My impression on the deeds is, that the policy was intended to be

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(a) Lloyd & G. temp. Sugden, 270.

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a security for the consideration money, that is, in return of the money ; but as there was no contractual part of the grantee to keep up the policy, the question which now arises is, what is the effect of his having continued it ? In 1835, there having been in the previous year another annuity of 33*l.* granted to the same *Johnstone*, for the lives of *Richard* and *George Kidd*, the annuities were increased to an annuity of 100*l.*, and consolidated so as to form one annuity for the lives of *Richard* and *George Kidd*, and the life of the survivor, and policies of insurance for 700*l.* were effected upon the life of *George Kidd*. In 1836 this consolidated annuity and policies of insurance were assigned to the Plaintiff. In the year 1840 *Richard Kidd* died, and the Plaintiff received from the company the 200*l.* for which *Richard's* life had been insured. Now, it seems to have been forgotten in the argument, that upon that event the annuity was not of the same value as before. An annuity for one life is obvious, is not of the same value as an annuity for two lives ; and, therefore, though the 200*l.* has been received, though the Plaintiff has got the fruit of the payment he has made on foot of the insurance, yet the annuity has proportionably decreased in value. This annuity is not an annuity for the life of the survivor. Redeemed it may be ; and if so it must be redeemed by one payment of the whole consideration. But redeemed it need not be, it is not compulsory upon the grantor to redeem it, it is not probable that he will now do so, because the annuity is not now worth the original consideration money he apprehend, therefore, that the annuitant will be enabled to retain the 200*l.*, as a compensation for the loss of *Richard's* life. It is quite clear that the 200*l.* ought not to be a discharge of the arrears of the annuity. I cannot

the parties intended the policy to have been kept up for the purpose of paying arrears, which ought never to have been permitted to accrue. I cannot so decide unless it appears to be the contract of the parties. It is equally true that it ought not to be applied to a partial redemption, unless the annuitant is not bound to submit to a partial redemption. He is entitled to a complete redemption, or to none at all. What, then, am I to do with this money? I cannot give it to a person by whom the expense of the premium, properly speaking, was not defrayed, and take it from the person who has sustained that expense. I consider that the time is not come for disposing of the policy, and that it will not have arrived until the grantor is able to redeem. If ever that time should come, and the grantor should seek a redemption, which must be an entire redemption, the question will properly arise, whether this policy is to form part of the consideration for the redemption. If the annuity should never be redeemed, the consequence of holding otherwise would be, that the annuitant would not get back his consideration money. The receipt of the Plaintiff of the 200*l.* now is merely accidental. The policy dropped, and the money became payable; but the annuity was damaged by so much. No doubt the annuity was still of the same amount, but it is not the same in point of duration. If the annuity had been granted but for one life, and that life had been insured, there would be no doubt as to the Plaintiff's right to the amount of the insurance. This, therefore, is but the payment of part of the re-purchase money in anticipation; and supposing the annuity is not redeemed, the Plaintiff will, upon the death of the surviving life, receive the entire consideration money, which, in the view I have taken, appears to me to have been intended to be the bargain between the parties.

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The dropping of the life is merely accidental, and is, therefore, a circumstance over which the Court can have no control. The question, however, is of considerable importance, and I shall reserve my final judgment.

May 30. THE LORD CHANCELLOR:—

I have read over the documents in this case, and adhere to the opinion I have already expressed.

It is, as I stated, rather a singular case, arising principally from the circumstance of there being two grantors. The annuity was for the lives of the two grantors, and for the life of the survivor. Insurances were effected upon their lives, sufficient to cover the consideration money: one for 200*l.*, upon the life of *Richard Kidd*, and another amounting to 700*l.*, upon the life of *George*, the other grantor. There is nothing, however, to distinguish this case from the common one of a life annuity, secured by means of an insurance upon the life of the grantor, the annuity being of such amount as to enable the grantee, in addition to interest, to keep up a policy of insurance, so as eventually to secure the repayment of the principal. In such a case, the grantee may either put the annuity wholly into his pocket, and thus become his own insurer, or effect an insurance, and thus secure the payment of the money at the death of the *cestui que vie*. Here the insurances were for different sums, and at different times. Nobody could have anticipated that the result would have been different from what it is. Nobody could have supposed that the two lives would fall at the same instant. One or other must, in the ordinary course of events, have

~~was~~ dropped first. That has occurred, which, from the nature ~~of~~ the transaction, must have been expected, that instead ~~of~~ the whole consideration money being paid at once, an ~~instalment~~ of it has been received. A portion has come to hand during the continuance of the annuity. The remainder will be paid when the annuity falls, at the death of the surviving *cestui que vie*. But I can do nothing with this money. The party received it in payment of a portion of the value of the annuity. What may be the effect of this state of things, in the case of a re-purchase of the annuity, I do not feel myself called upon to consider: and ~~as~~ I desire to be understood as not deciding that point. All ~~my~~ I decide is, that there is to be relief according to the prayer ~~of~~ the bill, and that the 200*l.* is not to be taken into the ~~re~~ annuity account.

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Declare the annuities in the pleadings mentioned, making together 100*l.* per annum, well charged on the houses and premises comprised in the deed of annuity, bearing date the 28th of February, 1835. Refer it to the Master to take an account of what is due to the Plaintiff on foot of said annuity of 100*l.* per annum. Let the Defendant pay to the Plaintiff the sum which shall be found due, on taking said account, together with the Plaintiff's costs in the cause, when the same shall be taxed and ascertained. Refer it to the Master to appoint a receiver over the houses and premises comprised in the said deed of annuity, bearing date the 28th of February, 1835; and let the said receiver pay the arrears of the said annuity of 100*l.* per annum, and keep down the accruing gales thereof. Liberty to either party to apply to this Court, as there may be occasion.

Decree.

Reg. Lib. 88, fol. 29, 1843.

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DEASE v. REILLY.

May 27.

The Court will not allow a receiver, who has not accounted within the time prescribed by the 148th General Order, his poundage, upon a consent signed by the guardians of minors interested in the funds.

THIS was a motion to make a consent a rule of Court. The terms of the consent were, that the receiver in cause should be allowed his poundage, notwithstanding that he had not accounted within the period prescribed by the 148th General Order.

There were minors in the cause, but the consent was signed by their guardians.

The motion had been originally made at the Rolls, but was there refused, and the present application was brought by way of appeal from the decision of his Honor.

Mr. *Codd*, in support of the motion, stated, that the cause had originated with the parties in the cause, who were endeavouring to effect a settlement of the matters in the controversy, and were anxious, pending such arrangement, to save the expense of passing the account.

Judgment.

THE LORD CHANCELLOR refused the motion, saying that nothing required to be more strictly watched, than the signing of receivers' accounts: that where the parties were competent to consent, they of course could deal with the cause as they pleased; but that where there were minors in the cause, the Court would not sanction any such arrangement.

I. THOMPSON v. HEFFERNAN.

1843.

THE bill in this cause was filed by *Edward Thompson*, the nephew and administrator of *Thomas Thompson*, and it prayed for a discovery from the Defendant *William Heffernan*, and an account, of the personal assets of the intestate, *Thomas Thompson*, which had come to his hands, and that the Plaintiff, as the personal representative of the deceased, might be declared entitled to the same.

May 29.
Where a disposition of money is attempted to be supported as a *donatio mortis causâ*, a mere general statement of the fact of a gift having been made, is not sufficient; the Court requires to be informed of the most minute particulars, how, and where, and in whose presence the gift was made, and in what condition of mind and body the alleged donor was.

The bill stated, that *Thomas Thompson*, who, at the period of his decease, was much advanced in years, departed this life at Templemore, in the county of Tipperary, on the 31st of December, 1838; that he had been always in the habit of keeping in his house his money, being unwilling to invest the same in the bank or on any security; that at the time of his decease, he was possessed of a large sum of money, amounting at least to 1200*l.*, and also of household goods and furniture of the value of about 100*l.*; that the Defendant, the Rev. *William Heffernan*, was the Roman Catholic clergyman of Templemore, and as such attended the intestate in his last illness; and that immediately upon his death he possessed himself of all the intestate's money and household property, alleging that the intestate had, previously to his death, given the same to him as a *donatio mortis causâ*. The bill charged that the intestate had never given the same to the Defendant, that no right or property could have passed in the same, without some actual tradition or transfer, and that none such ever took place; but that on the contrary, after the decease of *Thompson*, on the 31st

It is essential to the validity of a *donatio mortis causâ*, that the money, or the subject of the gift, should be actually handed over at the time.

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of December, he had received from one *Dorcas Greene*, who was the housekeeper of the intestate, a large bundle of bank notes; and that he refused to account for the same, or disclose the particulars of the assets of the deceased.

The Defendant in his answer admitted that he was one of the Roman Catholic curates of Templemore, and as such attended the deceased in his last illness; that he was acquainted with him for upwards of twelve years, during which period he had led a very secluded and retired life, separate and estranged from his relations; but that he (the Defendant) had always lived with him upon terms of the closest friendship which continued up to the period of his death. He stated, that he was sent for by the intestate on the evening of the 30th of December, and accordingly attended him; that when he was about to leave the room, the said *Thompson*, being in such his last illness, and fully conscious of his approaching death, in the presence of *Dorcas Greene*, directed the said *Dorcas Greene* to hand to him (the Defendant) a sum of money, which, the intestate said, was in a certain box in his bed-room, and which he then pointed out; and he told the Defendant to pay thereout to *Dorcas Greene*, who had been his housekeeper for many years, the sum of 50*l.*; to pay *Maria Woods*, the sum of 5*l.*; also to pay thereout his funeral expenses; and he then directed Defendant to retain and keep the remainder of said money as his own private property. The Defendant, by his answer, then proceeded to state, that the intestate at the same time took from his pocket of his trowsers (which during the whole time of his illness he kept secure under his pillow) the key of the said box, and handed it to the said *Dorcas Greene* for the purpose aforesaid; but that, as it was then late in the eve-

ing he did not take the said money that night, but said he would call in the morning.

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The answer then stated, that on the following morning, about the hour of 8 o'clock, the said *Thompson*, being in full possession of his faculties, and conscious of his approaching dissolution, again directed the said *Dorcas Greene* to hand to Defendant the said money, which he had as before mentioned directed to be given to Defendant on the previous evening; that *Dorcas Greene* thereupon opened the box, took out of it the said money, and in the presence, and by the direction of the intestate, handed it, to the amount of between 600*l.* and 700*l.*, to the Defendant; that in the latter part of the same day Defendant again called to see intestate, who was then perfectly conscious, and did not express any wish to revoke the said disposition of the money, which he had so made, but seemed to be quite satisfied therewith. The Defendant then stated that the deceased departed this life about the hour of three o'clock on the afternoon of the same day; and he submitted to the Court that the gift was a *donatio mortis causa*, and was attended with all the legal characteristics of a gift in contemplation of death; and that he was entitled to retain the subject-matter of said gift, in opposition to the claims of the Plaintiff, or of any of the next of kin of the deceased.

The Defendant also stated, that he paid the 50*l.* to *Dorcas Greene*, and the 5*l.* to *Maria Woods*, and about the sum of 30*l.* for the funeral expenses of the deceased.

On the part of the Plaintiff, the evidence of *Maria M' Cann* was read; she stated, that she did not live with

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the late Mr. *Thompson*, but was employed daily to assist the servant who lived with him, and for the last month had never left the house, day or night, except occasionally. That on the 30th of December, the deceased was evidently dying, that he spoke but at intervals during the day, and was in a very exhausted state; that between the hours of eight and nine o'clock, while the witness was supporting him, they perceived that he was worse, and told him that he was dying; to which he replied, in a peevish manner "that he was not;" that she then asked him, might she look up the money, which was at the head of his bed; that he desired her do so, which the witness accordingly did and gave the key to *Greene*, the housekeeper, who was lying at the foot of the bed. The witness then stated, that the latter then went up to the head of the bed and asked the dying man, if she might send for father *Heffernan*, to settle with him any matters he might have. He said "no," two or three times; but being pressed on the subject, and upon his muttering something, which the witness could not distinguish, Mr. *Heffernan* was sent for. In an hour after he came to Mr. *Thompson*, and on his entering the room observed that *Dorcas Greene* had always told him, that he was the person to attend Mr. *Thompson* in his dying moments; to which observation, however, the dying man made no reply. The witness stated, that she was then turned out of the room, but remained close to the door, which was only partially closed, and heard everything which was said with her. The first thing the Defendant did, was to christen Mr. *Thompson*; and she heard him say, "I am going to christen you, *Thomas Thompson*, over again, that you may be in the Catholic faith;" and after making use of some words which the witness did not understand, and concluding the ceremony, he then asked Mr. *Thompson*, what he intended

do with his money ; to which the other said he intended to leave 50*l.* to *Dorcas Greene*, and 5*l.* to *Maria Woods*. The Defendant then said, "on the word of a clergyman and a gentleman, whatever you desire me to do with your money, I will do it, after paying your funeral expenses." The intestate replied, he might do as he liked with the remainder. The clergyman then asked him, where he could get the money to pay the legacies and funeral expenses ; when *Mr. Thompson* said *Dorcas* would give it to him. The witness then stated, that the Defendant retired that night without taking any money, and in less than an hour the deceased began to rave ; that the Defendant returned the next morning about seven o'clock ; that *Mr. Thompson* was then lying in a state of insensibility ; that the Defendant went up at once to *Dorcas Greene*, the housekeeper, and that she opened a box, and taking out some money handed it to him ; whereupon he left the house immediately, without speaking to any person.

Dorcas Greene, the housekeeper, was examined on the part of the Defendant. She stated, that she had known the deceased for many years, during which time she had resided with him as housekeeper : that he had lived upon the most friendly terms with the Defendant, *Heffernan*, who always attended him when he was in any trouble. With respect to the transaction of the 30th of December, the witness stated, that the intestate, who, though he was in a very feeble state, was yet sound in his mind, received the Defendant with a warm welcome, having sent for him ; and said to the witness, " Give the money you'll find in the coat pocket, in the box, to Father *Heffernan* ;" and that he then said to the Defendant, " There is 50*l.* for

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Dorcas Greene, and *5l. for Maria Woods*. Give that sum to them, and, after paying my funeral expenses, do as you like with the rest of it." The Defendant said to-morrow would do. The witness further stated, that she used to keep the key of the box while her master was very bad and that Mr. *Thompson* was so weak, that he was not able to moan, and spoke very low. The witness then stated that the Defendant called again in the morning, about eight o'clock, and that the deceased recognized him : then the witness then went, and took the money, which she found in the pocket of the coat in the box, and handed it (a large bundle of notes, she did not know what the amount of was) to the Defendant, which he accordingly put into his pocket, in the presence of the deceased. The witness stated, that the dying man was then very weak, but that he was able to speak : she did not recollect what was said about the money, but she thought he must have said something to remind her of giving it to the Defendant, "I am sure she would not give it to him, or go to the box for it if he did not desire her."

Argument.

Mr. Serjeant *Warren*, Mr. *Berwick*, and Mr. *Sterlin* for the Plaintiffs, submitted, that the statements in the answer of the Defendant had been directly contradicted by the testimony of the Plaintiff's witness, *Maria McCan* : and that they were also inconsistent with the account given by the Defendant's own witness : that the alleged gifts were not made in contemplation of death, for that at the time when it was said that the intestate had given the money he had declared that he was getting better : and lastly that there was no actual delivery of the money at the time

of the gift. *Jones v. Selby(a)*, and *Walter v. Hodge(b)*, were cited.

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Mr. Moore, and Mr. H. G. Hughes, for the Defendant, contended that when the gift was made, the donor was *in extremis*; and that the tradition was complete, the money being handed over within a very few hours after the declaration of the gift, in the presence of the intestate, and without any change of intention on his part.

THE LORD CHANCELLOR :—

Judgment.

When a clergyman attends upon a person in his last moments, and sets up a gift from the dying man to himself, the evidence of the transaction ought to be perfectly free from all suspicion, and such as to leave no reasonable doubt in the mind of the Court as to its truth. A death bed is not the fit place, nor the proper time, at which a clergyman of any persuasion should look to his own personal interest, or seek to obtain the property of the dying man. On such an occasion, if a man has a testamentary intention, and time allows, proper advice should be obtained, some professional person should be sent for, and disinterested witnesses called in: all due solemnities should attend the disposition of the property. Advantage ought never to be taken of a man's last moments, in order to obtain dispositions of his property, in favour of persons not connected with him by the ties of blood: and I shall always require strong evidence, more especially in the case of a clergyman, before I support a gift made *in extremis*.

(a) Prec. Chan. 300.

v. *Markham*, 7 Taunt. 224; *Gard-*

(b) 2 Swanst. 92; see also *Bunn* v. *Parker*, 3 Madd. 184.

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In the present case, there appears to me to be the strongest evidence against giving effect to what is here called a bequest. The answer of the Defendant is calculated to excite great suspicion, for he does not state the amount of the money which he took from the dying man's house. The testimony of the housekeeper is, that she handed a large bundle of notes to the Defendant, without taking any precaution to ascertain their amount. These notes the Defendant put into his pocket; and when subsequently called upon, in a Court of Equity, to account for the sum—which, if the claim he sets up were not valid, he would be bound to refund—he thinks proper in his answer to state, generally, that the amount was between 600*l.* and 700*l.* In a case like the present, to support such a disposition, I should require not a mere general statement of the fact of a gift having been made, but to be informed of the most minute particulars: the amount, how it was given, where, and in whose presence, and in what condition of mind and body the alleged donor was; in fact all such particulars as might be expected in a fair transaction. The Defendant's case is, that he had been sent for the last illness of Mr. *Thompson*, and that in the presence of *Dorcas Greene*, the housekeeper, *Thompson* directed her to hand to the Defendant a sum of money, which said was in a certain box; that he directed a legacy of 5*00* to be paid to the housekeeper, and a sum of 5*l.* to a person of the name of *Woods*, and told the Defendant, after payment of the funeral expenses, to keep the remainder as his own private property. The Defendant admits that he did not take away the money at that time, but that he called on the following morning, and took it away. Now, if the Defendant's statement be correct, the transaction is more like a nuncupative will, than a *donatio mortis causa*.

which is permitted by law, it is true, but is always accompanied by certain acts, which are essential to its validity ; one of which is, that the money, or the subject of the gift, should be actually handed over at the time. If a man, on his death bed, call an intended legatee, and put a bag of money into his hands, or deliver over to him a mortgage security, as was done in *Duffield v. Hicks*(a), such a gift is good, and will be sustained in a Court of Equity. But here there appears to have been a general disposition of this man's property, in the nature of a will. He constitutes the Defendant substantially his executor ; he directs him to pay his debts and legacies, and, according to the Defendant's statement, to retain and keep what should remain, as his own private property. Now, observe what the story of the Defendant's own witness, *Dorcas Greene*, is. She states that the dying man said, " There is 50*l.* for *Dorcas Greene*, and 5*l.* for *Maria Woods* ; give that sum to them, and, after paying my funeral expenses, do as you like with the rest of it." These two accounts are, in my opinion, manifestly inconsistent. I can understand a dying man, who had lived a solitary and retired life, as this gentleman appears to have done, after giving a few legacies to the domestics who were immediately about him, saying to the clergyman who attended him, and who had been his confidential friend, " do what you like with what remains." But it is a very different thing to direct that clergyman to retain what remains as his own private property. It is by an examination of such minute particulars that such a case as this is to be tried : and I think that the Defendant has failed in the proof of the very object of the gift.

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(a) 1 Dow & C. 1.

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But there are other variances between the statements in the answer and those of the witness. The Defendant says that *Thompson*, after having made the gift, "took from the pocket of his trowsers (which the said intestate, during the whole time of his illness, kept secure under his pillow) the key of the box, and handed same to *Dorcas Greene*." How is this to be reconciled with the evidence of *Dorcas Greene*? She states, that *Thompson* told her to "give the money you'll find in the coat pocket, in the box, to Father *Heffernan*;" and she then adds, "I used to keep the key of the box, while the deceased was very bad." The evidence of *Dorcas Greene*, as to the possession of the key, is supported by that of another witness, *Maria M'Cann*, who states that *Thompson* desired her to lock up the money which was at the head of his bed, which, the witness says, she did, and gave the key to *Greene*, his housekeeper. Here, then, there is a direct contradiction of the answer of the Defendant. But again, the Defendant, in explanation of his not having taken away the money that night, says, "as it was then late in the evening," he did not take it away. But the reason, probably, was this: he had been preparing *Thompson* for death, and he felt that at such a moment it would have been unseemly to ransack boxes for money, and to carry away the whole of the property out of the house. At that time *Thompson* was speaking very low, and could with difficulty even *moan*. If the minister of religion, at such an awful moment, will desert his office, it is not only the privilege, but the duty of the law, to throw its protection around the individual. The Defendant makes another extraordinary statement, that when he came again in the morning, the dying man repeated the same directions he had given on the previous evening, as to the application of the money. Is it possible

to give credit to this statement? *Dorcas Greene*, the housekeeper, his own witness, who handed him the money on that occasion, is silent on the subject, only saying, "Sure I would not have given it to him, if I had not been desired:" but she never ventures to swear that she was desired; and it is perfectly clear that *Thompson* was unable to express any such desire. I am of opinion that the gift was not made on that occasion either by the directions, or with the authority, of *Thompson*. I have never seen a case calling for more marked disapprobation. I shall give the Plaintiff a decree, according to the prayer of his bill; and the Defendant must pay all the costs of the suit up to the present time(a).

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(a) See *Hills v. Hills*, 8 Mees. & W. 401.

KNIFE v. M'MAHON.

THE LORD CHANCELLOR said in this case, that counsel were perfectly justified in acting upon their own discretion and judgment, in determining whether a minor heir-at-law should take an issue of *devisavit vel non*, and that Lord *Eldon* had expressed an opinion to the same effect.

1843.
June 2.
Counsel acting for a minor heir-at-law, are justified in exercising their discretion, whether or not he ought to take an issue of *devisavit vel non*.

Mr. Serjeant *Warren*, for the Plaintiff.

Mr. *Monahan*, for the minor Defendants.

1843.

HOGAN v. BAIRD.

June 2.

Where a mortgagee unnecessarily files a bill for foreclosure, subsequently to the bankruptcy of the mortgagor, he will not get more costs than he would have been entitled to by proceeding in the matter of the bankruptcy.

THIS was a foreclosure suit. Previous to the filing of the bill, a commission of bankruptcy issued against the mortgagor, and the assignee of the bankrupt served notice on the mortgagee, calling upon him to come in and prove his demand in the matter of the bankruptcy. It appeared that the right to the equity of redemption in the mortgaged premises, subject to the Plaintiff's mortgage, was the subject of dispute. A question was raised as to the costs of the suit.

Mr. *Rogers* for the Defendant, the assignee.

Mr. Serjeant *Warren*, Mr. *Moore*, Mr. *Sausse*, for the Plaintiff.

Judgment.

THE LORD CHANCELLOR :—

In this case the bill appears to me to have been properly filed, for the dispute between the co-Defendants, as to the equity of redemption, has rendered it necessary; ~~the~~ Plaintiff is therefore entitled to the ordinary decree as to ~~his~~ costs. As a general rule, however, I wish it to be understood, that where a bill is filed for a foreclosure, and ~~the~~ mortgagee might have the same relief by proceeding in the bankruptcy matter of the mortgagor, I will not give the Plaintiff more costs than he would have been entitled to, if he had pursued the shorter and less expensive remedy^(a).

(a) So where a party filed a bill to raise the amount of a judgment, the Court allowed him those costs only, which he would have incurred, if he had proceeded by petition. *Tyrrell v. Hassard* Flan. & K. 625.

WHITE v. BAYLOR.

1843.

June 3.

THIS was a foreclosure suit, and by the decree, pronounced on the 4th of May, 1840, it was referred to the Master to take the usual accounts of the sums due upon foot of the Plaintiff's demand, and of prior and contemporaneous incumbrances.

A trader confessed a judgment to *A.*, and executed a mortgage to *B.*; the execution of the deed of mortgage was subsequent to the entering up of the judgment. The trader afterwards became a bankrupt:—*Held*, that the mortgage was to be paid in the first instance, and that the judgment was within the operation of the 6 Will. IV. c. 14, s. 126.

The case of a mortgage creditor stands on altogether a different footing from that of a purchaser.

On the 26th of May, 1843, the Master made his report, from which it appeared that in Trinity Term, 1825, *Thomas Gardiner* obtained a judgment in the Court of King's Bench, for 800*l.*, against *John William Anderson*. At the time of the rendition of this judgment, *John William Anderson* was a trader within the meaning of the bankrupt laws, and subsequently a commission of bankruptcy was duly issued against him. The judgment afterwards became vested in *Lewis Minchin*, one of the Defendants in the cause. By indentures dated respectively the 27th of September, 1832, and 25th of January, 1836, *John William Anderson* conveyed certain lands, of which he was then seised, to *Peter Maguire*, by way of mortgage, to secure sums of money amounting to 3000*l.*; these mortgages afterwards became vested in the Plaintiff, *Henry White*, as the personal representative of the mortgagee. Several other incumbrances, mortgages and judgments, were proved in the cause.

Under these circumstances the Master by his said report found, that the judgment of 1825, vested in *Minchin*, was levelled with the debts proved under the commission of bankruptcy, which issued against the conuzor, *John William*

1843.

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Anderson, and, therefore, did not interfere with the operation and effect of the mortgages vested in the Plaintiff.

To this report *Lewis Minchin* filed the following exception.

For that the Master had upon the charge of *Lewis Minchin*, and discharge of the Plaintiff, reported that the judgment of Trinity Term, 1825, so vested in the Defendant *Lewis Minchin*, was levelled with the debts proved under the said commission; whereas the Master ought not, at the instance of the said Plaintiff, to have reported that the said judgment of 1825 was levelled with debts proved under said commission, but ought to have reported that the said judgment was not levelled with the debts proved under the said commission, and ought not to have permitted the said Plaintiff, being only a subsequent mortgagee of the said lands, to raise or argue any question on the validity of the said judgment under the Statutes in force respecting bankrupts in Ireland, for his own benefit and advantage.

The cause now came on to be heard upon the report and exception.

Argument.

Mr. *Berkeley* for the exceptant, *Lewis Minchin*.

The bankruptcy of *Anderson* does not affect the right of his judgment creditors as against his mortgagees. The lien of the former attached upon the legal estate in his hands and cannot be removed by any act of his; nor do the Statutes of bankruptcy in this country affect the present case. It is true the Act 6 Will. IV. c. 14, enacts, in the 126th section, that no creditor having security for his debt "shall receive upon any such security more than a rateable part of such debt;" but this section is conversant with the administration of the bankrupt's property in the matter

his bankruptcy, and can have no application, where, previous to the bankruptcy, the estate, upon which the lien has attached, has been transferred from the bankrupt. In *Orlebar v. Fletcher*(a), a trader seised of lands in fee, gave a judgment to *B.*, and then sold the lands to *C.*, and afterwards became bankrupt: though the judgment creditor could not come in for more than his proportion with the bankrupt's creditors, yet it seems to have been agreed that he might extend the lands in *C.*, the purchaser's hands, *C.* having purchased before the bankruptcy; but this without prejudicing the creditors. So, also, where a trader gives a judgment, and articles for a valuable consideration to sell, and then becomes a bankrupt, in such a case the judgment shall bind the lands in the hands of the vendee, who articted to buy them; although whatever money the purchaser was to pay the bankrupt, the same shall be liable to the bankruptcy. In *Sloper v. Fish*(b), the bankruptcy intervened between the execution of the deeds of conveyance and the payment of the purchase-money; and the question was, whether, assuming the conveyance to be absolute, and not, as was contended, an escrow only, a judgment creditor had a claim upon the land, as against the lien of the assignees, for the purchase-money; and Sir *William Grant* considered the point to be too doubtful to compel a purchaser to take the title derived from the assignees. A mortgagee is a purchaser *pro tanto*. The present case bears a remarkable analogy to some decided on the Registry Act(c). In *Sparrow v. Cooper*(d) there was first an unregistered deed, then a judgment, and lastly a registered deed. The Statute gave the third incumbrance priority over the first, but not over the second, and accordingly it was held, that the judgment had priority

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(a) 1 P. Wms. 737.

(b) 2 Ves. & B. 145.

(c) 6 Anne, c. 2.

(d) 1 Jones, 72.

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over the unregistered deed by force of the Statute, being as the Judges expressed it, carried up on the back of the registered deed. So here the mortgagee took his mortgage subject to the lien of the judgment creditor, and he must carry up that lien above the general creditors.

Mr. Serjeant *Warren*, Mr. *Barry*, and Mr. *Robt Holmes*, for the Plaintiff.

The case of a purchaser is the only exception to the general rule, if, indeed, that exception can be considered yet established. There is, certainly, no authority for extending the principle to the case of a mortgagee. The effect of such an extension would manifestly be to defeat the policy of the bankrupt laws. It cannot be contended that the judgment creditor is to derive the fruits of alleged lien and priority out of the produce of the mortgage itself. Such a decision would be equally opposed to the policy of the bankrupt laws and the principles of justice. Again, if it is insisted that the judgment is to be satisfied, not out of the mortgage itself, but out of the mortgaged estate, this would push the mortgage upon the equity of redemption remaining in the bankrupt, and therefore diminish, *pro tanto*, the estate remaining in the bankrupt, and applicable to the payment of his general creditors. The 126th section of the 6 Will. IV. c. 14, is general in its language, and applicable to all cases and circumstances.

Mr. *Berkeley*, in reply.

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THE LORD CHANCELLOR:—

I never entertained any doubt upon this point. The Act of Parliament expressly cuts down the operation

judgment debts against the general assets of the bankrupt, which are to be administered. But there may be peculiar circumstances : for instance, suppose the case of a man who ultimately became a bankrupt, against whom judgments had been recovered, and, who, subsequently to the recovery of the judgments, sold his estate. The judgments bound the land in the first instance ; they bound it in the hands of the purchaser. What then was the intention of the Act ? Was it to cut down the operation of those judgments for the benefit of the purchaser ? Certainly not ; the object was the benefit of the general body of creditors, not the benefit of the purchaser, who has taken the estate out of the bankrupt, and who was not within the contemplation of the Act. The case of a mortgage creditor stands upon altogether a different footing. He takes, no doubt, subject to the existing debts ; but according to his priority he must be paid in full.

Assuming, as I must do, that this estate is sufficient to answer the amount both of the judgments and the mortgage, I have to consider the position of the general body of creditors. I cannot give the judgment creditor a greater right than he has independently of the Act. If I decide this point in favour of the judgment creditor, as there is nothing in the Act to affect the right of the mortgagee, the mortgage as well as the judgment must be paid out of the estate. This cannot admit of any doubt, although the learned counsel, who argued the case extremely well, seems to dissent. It appears to be supposed that the judgment creditors are to take in preference to the mortgagee, and so as *pro tanto* to defeat his claim ; but the establishment of the judgments would not affect the right of the mortgagee to the whole equity of redemption,

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subject to the judgment debts: the mortgagee is entitled to the whole estate for the satisfaction of his debt, as against the general body of creditors. It is, therefore, evident, that to decide in favour of the judgment creditor would be in effect to take so much out of that estate for the individual creditor, which the Act intended should be distributed rateably amongst all. The result then is, that this case falls within the Act. If I give effect to the judgment as against the mortgage, I must affect the general creditors, for it would then operate as a specific lien on the very property, which the Act entitles them to have distributed rateably with those judgment creditors.

I have often had occasion to consider the point, and never entertained a doubt upon it. The judgment creditors, in such a case as the present, are cut down by the operation of the Act, and must come in for a rateable part on with the other creditors(a).

(a) In the subsequent case of *Baldwin v. Belcher*, 1 Jones & L. 18, *G. C.* being entitled to the lands of *T.* under a contract for the purchase of the fee-simple thereof, in 1835 confessed a judgment to *Wise*. In February, 1836, *G. C.* mortgaged the lands to *H. Cornwall*, and in June in the same year he executed a mortgage of the same lands to *Wise*, to secure the repayment of the sum due upon foot of the judgment of 1835, and a further advance then made. In 1837, *G. C.*, the mortgagee, became a bankrupt, and it was decided that the judgment of 1835 was entitled to priority over the mortgage of February, 1836, to *H. Cornwall*, upon the principle that the whole of the demand on foot of the two mortgages, which included the judgment debt, was to be satisfied, before the assignee could receive anything out of the property. In pronouncing judgment in that case, the Lord Chancellor said "that a purchaser would be bound by a judgment entered up against the seller of an estate, although the latter becomes a bankrupt after the conveyance, admits of no doubt. I will not say that the question has been actually decided, but the principle of cases *Orlebar v. Fletcher*, 1 P.

Wms. 737, and Sloper v. Fish, 2 Ves. & B. 145, and the general opinion of the Profession, leave no doubt, that in such cases the judgment does bind the estate in the hands of the purchaser, and that the Acts relating to bankrupts do not affect the judgment." See on the subject of this case Newland

v. ——— 1 P. Wms. 92, and Sharpe v. Roadhe, 2 Rose, 192, In the last-mentioned case Sir William Grant held, that where the vendor became a bankrupt before the conveyance, the judgments were inoperative against a title derived from the assignees.

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CHARLES SULLIVAN FORSTER had been engaged as the solicitor and law agent of *Catherine Long Everard*, from the year 1792 until the period of her death, which occurred in the year 1813. Some time previously, there having been a considerable sum due to him for costs, exceeding the sum of 700*l.*, *Catherine Long Everard* borrowed from *Charles Sullivan Forster* a sum of 77*l.* 0*s.* 4*d.*, for which she gave her promissory note, bearing date the 26th of July, 1810, payable at six months.

A. B. being indebted to her law agent in a considerable sum for costs, and also on a promissory note, by her will ordered, in the first instance, her debts to be paid as soon as conveniently might be after her decease: she then devised her real estate to her brother, and directed "that all costs and charges which might be due to her law

Forster had been employed by *Catherine Long Everard* as her solicitor in several causes, and, amongst others, in a cause

"agent" at the time of her decease, should be paid by her brother out of the rents of the real estate. *A. B.* died in 1813. From the year 1815, the executors of the testatrix and the devisee of the real estate resided abroad, out of the jurisdiction of the Court; but in the year 1816, the law agent was paid, under an order of Court, in one of the causes in which the costs were incurred, a sum of 289*l.* 8*s.* 4*d.*, and subsequently the further sum of 100*l.*, by the agent of the devisee of the real estate. In 1819, the law agent filed a bill against the executor of the testatrix, and also against the owners of the real estate, to recover the amount of his demands; but in consequence of the absence of the Defendants no subpoena was served. In 1828, the Plaintiff in that suit having died in the meantime, his executors, the present Plaintiffs, filed a bill of revivor; but the Defendants being still out of the jurisdiction, no subpoena was served. In 1838, a second bill of revivor was filed, and subpoenas were served upon the Defendants, by means of an order obtained under the Statute 4 & 5 Will. IV. c. 82, which had been enacted in the interval:—*Held*, that the real estate was charged with the amount of the promissory note as well as the costs.

Held also, that the bar of the Statute of Limitation was saved by the filing of the bills in 1819 and 1828.

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of *Everard v. Dwyer*, relative to certain lands in the county of Tipperary, called the lands of Killoran, to which *Catherine Long Everard* was entitled, under a lease for three lives, with covenant for perpetual renewal.

On the 8th of May, 1813, *Catherine Long Everard* made her will in the following terms: "I order and direct, that all my just debts, together with my funeral expenses, be paid as soon as conveniently may be after my decease; and as for such worldly substance as it hath pleased Almighty God to bestow upon me, I do hereby give, devise, bequeath and dispose of the same in manner following." The testatrix then devised the lands of Killoran to her brother *James Long Everard*, for the term of his natural life, with remainder to the issue male of his body for ever: and in default of such issue male, to her brother *John Long Everard*, and his issue male, with remainders over; and, after bequeathing several pecuniary legacies, she proceeded as follows: "And it is my will and desire, that all costs, charges, and expenses, which are or may be due to my law agent, *Charles Sullivan Forster*, at the time of my decease, be paid to him by my brother, *James Long Everard*, out of the rents, issues, and profits, &c., of the said lands of Killoran devised to him as aforesaid;" and the testatrix appointed the said *James Long Everard* and *John Long Everard* her executors and residuary legatees.

Catherine Long Everard died on the 12th of May 1813, shortly after the date of her will, which was duly proved by the executors therein named. *James Long Everard* entered into possession of the lands of Killoran, devised to him by the will of his sister, and having by deed barred the *quasi* entail created by that will, he devised:

his estate and interest therein to his sister, *Eleanor Bourke*, and died some time in the month of April, 1816.

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At the period of the death of *James L. Everard*, *Eleanor Bourke* was resident in England, and she continued to reside there until her death. *John L. Everard*, the surviving executor of *Catherine L. Everard*, had previously, some time in the year 1815, left this country for the Continent, where he continued to reside.

On the 16th of July, 1816, the costs of the Plaintiff in the cause of *Everard v. Dwyer* were taxed, as between attorney and client, to the sum of 846*l.* 16*s.* 7*d.*, and by a report in the cause of the 16th of November, 1816, the Master found that there was due to *Forster* on foot thereof a sum of 711*l.* 13*s.* 9*d.* After the death of *Catherine Long Everard*, *Forster* continued to act for *James Long Everard* and *Eleanor Bourke*, successively, as their solicitor, in certain other suits in relation to the estate of the said *Catherine Long Everard*, and costs were incurred therein, which in the month of March, 1817, together with costs due by *Catherine* at her decease, and the promissory note for 77*l.* 0*s.* 11*d.*, amounted in the whole to the sum of 1246*l.* 17*s.* 3*d.* All of these costs were taxed, with the exception of some small items.

In the month of December, 1816, *Charles Sullivan Forster* received, under an order of Court, a sum of 289*l.* 8*s.* 4*d.* on account of said costs; and at a later period the further sum of 100*l.*, which latter was paid by Mr. *Eccles Cuthbert*, who acted as the agent of both *James Long Everard* and *Eleanor Bourke*; and it appeared, that subsequently an account was furnished by Mr. *Cuthbert* to Mrs.

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Bourke, in which credit was taken for these two payments generally, on foot of the costs.

On the 1st of April, 1819, the original bill in this cause was filed by *Forster* against *John Long Everard* and *Eleanor Bourke*, and *Hugh Bourke*, her husband, stating the amount due to him on account of his demands against the estate of *Catherine Long Everard* to be 866*l.* 12*s.* 6*d.*, and seeking payment thereof out of the real and personal estate of the said *Catherine Long Everard*. The bill prayed that the trusts of the will of the said testatrix might be carried into execution, and sought the usual accounts in such cases.

No proceedings were had under this bill, nor was there any subpoena served, in consequence, as it was stated, of *John Long Everard* and Mr. and Mrs. *Bourke* being all resident out of the jurisdiction.

In 1825, *Charles T. Forster* died, and on the 17th of September, 1828, his executors, the present Plaintiffs, filed a bill of revivor against *John Long Everard* and *Eleanor Bourke* (the husband of the latter had died in the year 1822), stating the several matters above mentioned, and praying that the trusts of the will of the said *Catherine Long Everard* might be carried into execution, and for an account of her estates, both real and personal, and that same might be marshalled; and for an account of what was due to the Plaintiffs on foot of the promissory note for 77*l.* 0*s.* 11*d.*, and the balance of the said bills of costs, and for payment thereof out of the personal estate, or in case same should not be sufficient, then that same might be declared to be well charged on the said lands of Killoran, and that said lands,

or a competent part thereof, might be sold, and that out of the produce of such sale, the Plaintiffs might be paid the amount of their said demands; and that said bill might be taken as an amended bill in the nature of a bill of revivor against the said *John Long Everard* and *Eleanor Bourke*, and that the Plaintiffs might have all benefit and advantage arising from said original bill so filed by said *Charles Sullivan Forster*, and that that cause might stand revived, and be in the same plight and condition that same was in at the time of the death of said *Charles Sullivan Forster*.

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No proceedings were had upon this bill; and in 1838 *John Long Everard* died intestate, and letters of administration *de bonis non* to *Catherine Long Everard* were granted to *Eleanor Bourke*.

On the 24th of December, 1838, another bill of revivor was filed by the Plaintiffs, the executors of *Charles Sullivan Forster*, against *Eleanor Bourke*, and on the 14th of March, 1839, an order was obtained by the Plaintiffs to serve her with process, under the Statute 4 & 5 Will. IV. c. 82, as a Defendant not resident within the jurisdiction.

Eleanor Bourke subsequently appeared to that bill; but before any further proceedings were had, she died, having by her will devised her estate of Killoran to *Richard Thompson*, the present Defendant, whom she also appointed her executor. *Thompson* duly proved the will of *Eleanor Bourke*, and having subsequently obtained administration *de bonis non* to *Catherine Long Everard*, he thus became, in point of fact, the personal representative of both.

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On the 20th of July, 1839, the Plaintiffs filed their bill of revivor and supplement against *Thompson*, and subsequently, on the 2nd of November, 1840, an amended bill, setting forth, in addition to the preceding facts, several matters, which are not material to be stated here.

The Defendant, *Thompson*, by his answer, set up, as a defence to the present suit, the Statute of Limitations, and submitted, that the filing of the original bill in this cause, in the year 1819, was not sufficient to save the bar of the Statute, inasmuch as no subpœna to appear and answer said bill was ever served upon any of the Defendants, *John Long Everard*, *Hugh Bourke*, or *Eleanor Bourke*, his wife. The Defendant, by his answer, also submitted that the testatrix had not, by her said will, charged her real estate with payment of her debts; but that even if, upon the true construction of the will, the Court should hold that the debts of said testatrix, including the said promissory note and bills of costs, were made a charge upon the lands of Killoran, that inasmuch as *Charles Sullivan Forster* was the confidential solicitor and adviser of the testatrix, and the person by whom the said will was prepared, the Plaintiffs were bound to shew that such clause was introduced by *Forster* by the express directions of the testatrix, and that its effect was pointed out to the testatrix, before she executed same.

A letter from Mr. *Cuthbert* to *Charles Sullivan Forster* of the 11th of September, 1820, which was particularly referred to, is as follows :

“ SIR,—It is absolutely necessary that some final arrangement should take place relative to Mrs. *Bourke*’s

affairs ; I therefore beg of you to point out what you wish to have done, as I must, with a view to the settlement of her affairs, have your bill answered."

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The evidence of *Lawrence Keogh*, which was read on the part of the Plaintiffs, was to the following effect. He stated that in the year 1827 he went to Paris to see *John Long Everard*, and to induce him to return to Ireland to settle the transaction and account subsisting between him, as the personal representative of *Catherine Everard*, and *Charles Sullivan Forster*, or to execute a power of attorney appointing some person on his behalf to act for him ; that *John L. Everard* always admitted the justness of the claim, adding, however, that it ought to have been long since paid by his sister, *Elizabeth Bourke*, who was then, and had been long before, in possession of the Killoran property ; and he promised to execute such power of attorney, as soon as he had received a letter from his friend, *Mr. Stewart*, who resided in Dublin, and to whom he had written on the subject. The witness stated, that the reply not having arrived, after waiting nearly two months in Paris, he was obliged to return home, without having received the power of attorney, or any settlement of the demand.

Mr. Pigot, Mr. James O'Brien, and Mr. Loughan, for the Plaintiffs. Argument.

It cannot be disputed that where, in the commencement of a will, there is a general direction for the payment of debts, that they are thereby constituted a charge upon the real estate. This appears to be now quite clear upon all the authorities ; *The Earl of Godolphin v. Penneck(a)*,

(a) 2 Ves. Sen. 270.

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Clifford v. Lewis (a), Taylor v. Taylor (b), Graves v. Graves (c). Your Lordship followed this doctrine in the case of *Harding v. Grady (d)*. The will in the present case commences with such a direction, and contains expressions abundantly sufficient to make the real estate liable to the payment of the debts of the testatrix. This of itself furnishes an answer to the defence of the Statute of Limitations, which is relied upon by the Defendant. But independently of this, the proceedings in the cause are quite sufficient to save the bar of the Statute. The original bill was filed in 1819. At that time the demand of *Forster*, the party who is now represented by the Plaintiffs, was unaffected by the Statute: and ever since that time there has been a pending suit. It is true, that for several years after the filing of the original bill no effectual proceedings were taken in that suit. But the Defendant here cannot fairly rely upon this as a defence; the reason of the delay originated with the then Defendants, the parties whom the present Defendant, *Thompson*, now represents. They were absent from the country, out of the jurisdiction, and thereby evaded the service of the subpoena. Under the law as it then stood, the Plaintiffs had no remedy. They could not serve absent Defendants with process, and the Court will not permit a party thus to avail himself of his own default, and set up a defence springing out of his own wrong.

Mr. Monahan, Mr. H. G. Hughes, and Mr. Lawless for the Defendant.

No satisfactory answer has been given to the defence of

(a) 6 Madd. 33.

(b) 6 Sim. 246.

(c) 8 Sim. 43.

(d) *Ante*, vol. i. p. 430.

the Statute of Limitations, which is relied upon by the Defendant. In the first place, the words in the commencement of this will are not sufficient to charge the real estate with the debts. It is true, that where there is a general direction for the payment of debts in the beginning of a will, the effect is, that the real estate is thereby charged. But that rule, which always depends upon intention, cannot apply to the will in this case; for in a subsequent part of the will the testatrix expressly charges the lands of Killoran, the only real estate which she was possessed of, with the payment of the costs, which would be clearly unnecessary, if the introductory clause is to be construed to have the effect contended for at the other side. In *Douce v. Lady Torrington*(a), Sir John Leach, who decided *Clifford v. Lewis*, explains the rule, and shews that where no intention is indicated thus to create a new fund for the payment of the debts, the Court will not so construe the will, even though the testator should have commenced his will by a direction to the effect, that his debts should be paid with all convenient speed after his decease. If this be so, the portion of the Plaintiff's demand which consists of the promissory note is clearly barred. How then stands the residue of the demand, the bill of costs? It is true that the costs are charged upon the real estate. But does it therefore follow, that the effect of such a charge is to create an express trust in favour of the creditor? Clearly not; and if not, the right to recover the amount is, under the Statute of Limitations, barred. In *Dillon v. Cruise*(b), which will, no doubt, be cited at the other side, it was held, that there was there an express trust, which brought the case within the saving of the

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(a) 2 Mylne & K. 600.

(b) 3 Ir. Eq. R. 70.

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Statute ; so, likewise, in *Burne v. Robinson*(a) : although even there the right to interest upon the principal sum was limited to six years ; but here, at most, there is but a constructive trust created by the charge, which, after twenty years, would be clearly barred by the operation of the Statute. The question, then, comes to this, were the proceedings instituted originally in 1819, and subsequently in 1828, sufficient to take this case out of the Statute. Now, it appears to be clear, upon authority, that the filing of a bill, without service of subpœna, is a mere nullity ; in point of fact, therefore, the bill of 1838, the first, upon which any subpœna was served, must be treated as the original bill, and cannot be regarded as the continuation of an existing suit. In *Asbee v. Shipley*(b), where, upon the death of a party, who though named a Defendant in the original bill, was never served with subpœna, a bill of revivor and supplement was filed against his administrator and others claiming under him, Sir *John Leach* held, upon demurrer, that such a party, not having been served with subpœna, was never an effective party to the suit ; that his death, therefore, caused no abatement, and that consequently there could be no revivor ; and that the bill was, strictly speaking, original as to the administrator. Now, this exactly applies to the case before the Court. No subpœna was ever served upon any party until 1838 ; all the proceedings, therefore, which were instituted prior to that time, were of no avail. The Court has, therefore, only to regard the position of the claim at that period. But then it was clearly barred by the Statute of Limitations. The case of *Coppin Gray*(c) will be cited at the other side, to shew that

(a) 1 Drury & W. 688.
 (b) 6 Madd. 296.

(c) 1 Younge & C., C. C. 20.

mere filing of a bill within six years after the accruing of the right to sue will be sufficient to save the bar of the Statute. But in that case, Vice-Chancellor *Knight Bruce* expressly says, that "in a case of gross or improper delay between the time of filing a bill and any further proceeding in the cause on the part of the Plaintiff, a Court of Equity does not require any such rule to enable it, in the exercise of the judicial discretion belonging to it, to deal effectually with such a Plaintiff, and to provide amply for the protection of a Defendant so circumstanced, making the case by his answer;" and so in *Boyd v. Higginson*(a), Sir *Michael O'Loghlen* states, that upon a proper application the Court would prevent a suitor from availing himself of any such proceeding, by directing the bill to be taken off the file, or giving such other relief as the facts might warrant. These observations of two most eminent Judges shew, that notwithstanding the filing of a bill, if the Plaintiff has been guilty of improper delay, the Court has not lost its ordinary discretion, and will not permit him to rely on such an ineffectual proceeding; *Hercy v. Dinwoody*(b). In this case, from the filing of the original bill in 1819 until the year 1838, nothing effectual was done. It cannot be said that the absence of the Defendants from this country interposed any difficulty, for the Plaintiffs might have obtained an order to substitute service of the subpoena upon the agent of the parties, if they had thought proper to do so.

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Mr. *James O'Brien* in reply.

Douce v. Lady Torrington(c), which has been relied upon

(a) *Flan. & K.* 603, 613.

(c) 2 *Mylne & K.* 600.

(b) 2 *Ves.* 87.

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at the other side, is opposed to all the previous decisions and is, in point of fact, a case of no authority. In *Graves(a)*, the Vice-Chancellor of England speaks of it as a case decided without much consideration. The cases which have been already cited on the part of the Plaintiff and which are the leading cases upon the subject, establish beyond all controversy, that the will of *Catherine Longford* did operate to create a charge upon the real estate and thereby to establish a trust for the payment of debts, and that is sufficient to take the case out of the operation of the Statute of Limitations. Such was clearly the rule before the recent Statute, 3 & 4 Will. IV. c. 27; *Gus v. Gore(b)*; and even if the Court should be disposed to hold that Statute to have any application at all to the case yet by force of the twenty-fifth section, trusts are altogether excluded from its operation, *Kelly v. Kelly(c)*, *Dillon v. Cruise(d)*. But, independently of this, the bill, which was filed in 1819, and revived and amended in 1828, is sufficient to save the bar of the Statute. It is contended that these proceedings must be considered to be ineffective for that purpose, inasmuch as the Defendants were not served with any subpoena. But as the law then stood it was impossible to have served the Defendants with subpoena if they resided abroad, out of the jurisdiction of the Court. Any service of process to appear and answer would, in such circumstances, be a nullity, *Creed v. Byrne(e)*; and it was not until the year 1833, that the Statute 4 & 5 Will. IV. c. 82, was passed. It was equally unavailing for the Plaintiffs to have attempted to substitute service upon their agent. In *Lord Aldborough v. Paton(f)*, an ap

(a) 8 Sim. 43, 56.

(b) 1 Sch. & L. 107.

(c) 6 Law Rec. N. S. 222.

(d) 3 Ir. Eq. R. 70.

(e) 1 Hog. 79.

(f) 1 Hog. 131.

tion to substitute service of a subpoena upon the land agent and solicitor of a Defendant, resident out of the jurisdiction, was refused. *Aubrey v. Denny*(a) is to the same effect; the Plaintiffs here took every step which they could have taken; the delay and the alleged defect in the proceedings, which are now relied upon for the Defendant, was altogether occasioned by the acts of the parties, whom the Defendant represents: and this Court will never permit a party to rely upon an objection, which his own acts have altogether occasioned.

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THE LORD CHANCELLOR:—

This case is somewhat complicated; but when once the facts are understood there is no great difficulty. The question as to the promissory note depends altogether upon the construction of the will. It is said, that it is not charged upon the real estate by the general direction in the commencement of the will, because in a subsequent part of the will a particular estate is expressly made liable to the costs of the solicitor. The testatrix begins by a general direction that her debts shall be paid; and that is followed by a declaration of her intention to dispose of all her "worldly substance." She then devises a particular estate, which, it is said, constituted the whole of the real estate, to one brother, *James*, and she directs that all the costs, charges, and expenses, which shall be due to her law agent, *Charles Sullivan Forster*, shall be paid out of this estate; she then gives the principal part of the personal estate to another brother, *John*, and she appoints the two brothers her residuary

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(a) 1 Hog. 268.

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 —
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legatees and executors. Now if I were to hold, contrary to what is the settled rule of law, that the general direction for payment of debts in the commencement of the will did not charge this estate, I must pass it over altogether, and throw the debts upon the residue; for clearly this general direction must have some meaning, and that is the only way in which it could then operate. But this case forms no exception to the established rule; for after the general direction for payment of the debts, the will proceeds thus, "as to all my worldly substance,"—thus shewing an intention on the part of the testatrix, to make a general disposition of everything and she gives part, subject to a particular charge, to *A.*, and the remainder to *A.* and *B.*; but the whole is subject to the general direction for payment of her debts. I agree there may be charges imposed upon a real estate by a will in such a manner, as to shew that that estate was not intended to be burdened beyond the express charge. But I do not think that that is the case here: the testatrix may have thought that the costs were not included within the general direction; or, knowing that the costs were considerable she may have intended to throw them on that estate exclusively. That, however, is not sufficient to cut down the effect of the general direction, and it is much better to adhere here to the established rule. The suit, therefore, is well founded as to the note.

Then comes the more important question, as to the basis of the demand. The costs, which were of considerable amount, were furnished and made the subject of an account as far back as the year 1819; it is evident from the indorsement (*a*) upon the account viewed in connexion with

(*a*) The Reporters were unable to obtain a copy of this indorsement

payment of the 100*l.*, that it must have been in 1819. In that account credit was taken for two particular sums, one of which was part of a fund, which had been drawn out in a particular cause, and the other was a payment by the agent of the debtor; these payments were not carried to any particular credit, they appear generally on the credit side. Therefore, there is no question as to this demand upon the Statute of Limitations, for there is an acknowledgment of the debt, and a payment made by the debtor, generally, on account of what was due on foot of the entire demand, and not of any particular item.

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The bill was filed in 1819. It is said that that was not effectual to keep the debt alive, in consequence of no appearance having been entered, and a *dictum* from the judgment of Vice-Chancellor *Knight Bruce* in *Coppin v. Gray*(a) has been relied on for that purpose. But the distinction between such a case as that learned Judge supposes, and the present, is, that here, during the whole period, the parties were out of the jurisdiction, and, as the law then stood, the Plaintiff could not serve them with process of this Court, and he could not substitute service upon any one of them. The case(b), which has been cited upon the latter subject, was stronger than the present, yet the Court did not allow service to be substituted upon the absent parties. There were no means, therefore, by which the Plaintiff could have enforced his demand, and I should be slow to hold that, under such circumstances, the filing of the bill was to have no operation, because there was no appearance by the Defendant. And this, it is to be observed, was not the case of a bill filed behind the back of the parties; for

(a) 1 *Younge & C., C. C.*, 205. (b) *Aubrey v. Denny*, 1 *Hog.* 268.

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Mr. *Cuthbert*, in his letter of 1820, acknowledges that he was aware of it, and he thought fit to pursue a line of conduct, which, it must be now presumed, he adopted in reference to that bill. Since then the demand has been kept up; the proceedings in France, and the letters of the parties, which have been referred to, shew that demands have been made down to a late period.

But supposing that the objection applies to the bill of 1819, I have not heard any answer to the bill of 1820. There is nothing to shew that the Plaintiffs should not have the benefit of that suit, which has been regularly kept alive ever since. Again, there is the bill of 1838, to which no appearance was entered, because the law had been altered in the mean time, and the Plaintiffs served the process of the Court, as they would have done, if the law had allowed it at an earlier period, and this bill is now brought to a hearing. The Defendant ought to have taken the present objection at an earlier stage of the cause. I do not think that the Plaintiffs are barred by the Statute. The bill of 1828 would alone be sufficient to save the right, and I cannot discover anything in the conduct of the Plaintiffs since, to deprive them of the benefit of that bill. What Judges in England^(a) and in this country^(b) have said to the effect of a bill with reference to the Statute, viz. that although it was true, that the mere filing of a bill would operate by itself to save the bar of the Statute, that the Court would know how to deal with any improper delay after the filing of the bill; that is, that although the bill might save the bar of the Statute, yet that the Court

(a) *Coppin v. Gray*, 1 Young & C., C. C. 205.

(b) *Boyd v. Higginson*, Fla. K. 603.

might not give the benefit of it to the Plaintiff, if there was anything in his conduct to disentitle him to its assistance. Now has there been any misconduct on the part of the Plaintiffs to take away their right? None whatever. I see much to blame in the conduct of the Defendants; they attempted to evade the payment of their just debts, by residing out of the jurisdiction. The Plaintiffs sought to realize a fair demand, which has not been shaken; they took every step for the purpose which the law allowed, but the Defendants set them at defiance; the merits, in my opinion, are all on the side of the Plaintiffs, and there is no legal bar to their right.

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—
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It is unnecessary for me to decide the point as to the devise creating a trust, and the consequent effect of the recent Statute of Limitations, and therefore I shall leave it untouched. The only thing which remains is as to the mere form of the decree.

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June 9.

By indenture of marriage settlement, a power was given to the husband to appoint, by deed or will, the lands of Blackacre and Whiteacre, held under leases for lives renewable for ever, to any of the sons of the marriage, for any estate not exceeding an

estate *quasi* in tail male. The husband made his will, and after reciting the power, in execution thereof, devised the lands of Blackacre to a trustee to the use of his third son, *M.*, for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of *M.*, in succession; and in default of such issue remainder over to the testator's son, *N.*; and the testator then devised Whiteacre to his said sixth son, *N.*, for life, with remainder to trustees to preserve, &c.; remainder to *N.*'s first and other sons, with remainder to the donee of the power afterwards, by a codicil to his will, directed, that in the event of the decease of his own eldest son without issue, the limitation of Whiteacre to *N.* should and the lands should shift over to *M.* in tail male.

M., the third son, married in 1815, and by the deed of settlement then executed recitals of *M.*'s vested estate in Blackacre, and contingent interest in Whiteacre, all were limited to *M.* for life, remainder to the first and other sons of the marriage in tail, remainder, as to Whiteacre, to the daughters of the marriage, remainder, as to Blackacre, to the sixth son, for life, remainder to his first and other sons in tail, with similar limitations to his brothers and their issue.

In 1816 the eldest son of the donee of the power died without issue, whereupon came entitled unto, but did not obtain possession of, Whiteacre.

There were two sons, issue of *M.*'s marriage in 1815. In 1827, *M.* married a second time, and by the articles, which were executed upon that occasion, he covenanted to settle the lands, expectant upon the decease of his sons without issue, in all the lands, to the use of his first and other sons of that marriage in tail male, with remainder to the daughters of the marriage as tenants in common in fee. There was issue of this marriage, two daughters. The eldest son, the issue of the first marriage, died in 1840, under age and unmarried, his father, having died in 1835.

In 1841 a bill was filed by the daughters of *M.*, claiming both Blackacre and Whiteacre, that their right to the lands of Whiteacre was barred by the Statute of Limitations, that the parties claiming under the deed of 1815 were not estopped from disputing the title of the settlor to those lands.

Held, also, that the *cy près* doctrine may be applied to the execution of a power and accordingly, that the will of the testator in this case operated as a good appointment of the lands of Blackacre to *M.*, the third son, *quasi* in tail male.

Held, that the remainders limited by the deed of 1815 to the brothers of the settlor were merely voluntary, and that the Court would give effect to the articles of 1827, even though a legal estate vested in persons deriving under those voluntary limitations.

Held, accordingly, that the daughters of *M.* were entitled to Blackacre.

successively in tail, with power to charge the lands with a jointure, and with portions for younger children, it was witnessed, that in pursuance of the said powers *George Stackpoole* charged those lands with a jointure of 300*l.* per annum for *Jane Lysaght*, and with the sum of 3500*l.* for the younger children of the intended marriage: and by the same indenture, after further reciting that *Andrew Lysaght* was then seised *quasi* in fee of the lands of Lahensy, Ardnakelly, Dough, Ballyvorda, Ballybyan and Ballyea, and also of the lands of Ballyfadeen, Moymore, and Knockersceagh, under certain leases for lives renewable for ever, it was further witnessed, that *Andrew Lysaght* conveyed the lands last mentioned to *William Stackpoole* and *Matthias Finucane*, and their heirs, upon trust, as to the lands of Lahensy, Ardnakelly, Dough, Ballyvorda, Ballybyan and Ballyea, to the use of *George Stackpoole*, his heirs and assigns for ever; and as to the lands of Ballyfadeen, Moymore, and Knockersceagh, to the use of *Andrew Lysaght* for life, without impeachment of waste, remainder to trustees to preserve, &c., remainder to the use of the sons of *Andrew Lysaght*, for such estates not exceeding estates tail as he should appoint, and in default of appointment to them successively in tail male; remainder to the use of the daughters of *Andrew Lysaght* (exclusive of the said *Jane Lysaght*) for such estates not exceeding estates tail, as he should appoint, and in default of appointment to them as tenants in common in tail, with remainder to *George Stackpoole* for life, remainder to trustees to preserve, &c., with remainder (subject to an additional jointure of 100*l.* per annum thereby provided for *Jane Lysaght*), “from and immediately after the decease of the said *George Stackpoole*, to the use and behoof of all and every, or such one or more of the sons of the body of the said *George Stackpoole*,

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on the body of the said *Jane Lysaght* lawfully to be begotten, for such estate and estates not exceeding or larger than an estate or estates in tail male, and in such parts, shares and proportions, manner and form, with or without power of revocation, as he, the said *George Stackpoole* at any time or times during his life, by any deed or deeds, writing or writings, under his hand and seal, attested by two or more credible witnesses, or by his last will and testament in writing, should direct, limit, give, or appoint the same; and in default, &c., to the use of the first" and other sons of *George Stackpoole* and *Jane Lysaght*, in tail male, with remainder to their daughters, with remainder to the right heirs of *Andrew Lysaght* for ever.

Andrew Lysaght died without having had any other child than *Jane*, and accordingly on his decease, *George Stackpoole* became entitled to the lands of Ballyfadeen, Moymor and Knockersceagh for life, with the power of appointment above stated, and remainders over.

George Stackpoole had issue by his said wife *Jane Lysaght*, six sons, viz.: *George*, *Andrew*, *Matthias*, *Hugh*, *William Henry*, and *Michael*, and four daughters.

In the year 1794, *George Stackpoole*, the father, and *George*, his eldest son, took the necessary measures to do the entail of the estates devised as above stated by *Edmond Hogan*; and by indenture bearing date the 8th of March 1794, these estates were resettled, and limited to the use of *George Stackpoole* the father, for his life, subject, however to a rent-charge thereby provided for *George*, the son, with remainder to *George*, the son, in tail male, with remainder to *Andrew*, *Matthias*, *Hugh*, *William Henry*, and *Michael*

Stackpoole, the other sons, successively in tail male, with a joint power to *George*, the father, and *George*, the son, to revoke the uses thereby limited, and to declare new uses.

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By indenture bearing date the 14th of January, 1802, and made between *George Stackpoole* the elder, and *George*, his eldest son, of the first part; the Hon. *Matthias Finucane* of the second part; *William Skerritt* and *Clara Skerritt* of the third part; and trustees of the fourth and fifth parts, being the settlement executed upon the occasion of the intermarriage of *George Stackpoole* the younger with *Clara Skerritt*, after reciting the settlement of 1794, *George*, the father, and *George*, the son, revoked the uses which had been declared by that deed, and settled the lands therein comprised, including the lands of Clonroad and the Liffords, together with certain other lands, to which *George Stackpoole*, the father, was then absolutely entitled, as to some of the said lands, to the use of *George Stackpoole*, the elder, for life, with remainder to *George Stackpoole*, the younger, for life; and as to others of said lands, to the use of *George*, the younger, for life, with remainder as to all the lands comprised in this indenture, subject to a jointure for *Clara Skerritt*, the then intended wife, to the use of the first and other sons of *George Stackpoole*, the younger, in tail male, with remainder to *Andrew Stackpoole*, the second son of *George Stackpoole* the elder, for life, remainder to his first and other sons in tail male, with remainder to the other sons of *George Stackpoole*, the elder, *nominatim*, successively for life, and to their first and other sons in tail male; and the ultimate remainder was limited to *George*, the elder, in fee.

By indenture bearing date the 8th of June, 1803, being the settlement executed upon the occasion of the marriage of *Andrew Stackpoole* with *Bridget Comyn*, *George Stack-*

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poole, the elder, conveyed the lands of Mountcashel to *tees*, to the use (after the decease of *George Stackpoole* elder, and *Jane* his wife) of *Andrew Stackpoole* for with remainders over ; and then followed a shifting cl providing, that in the event of the death of *George S poole*, the younger, without issue male, whereby, und limitations contained in the settlement of 1802, *A Stackpoole* would become entitled to the estates limit that deed, the conveyance of the said lands of Mount should cease and determine, and the said lands revert lutely to *George Stackpoole*, the elder, his heirs and as

George Stackpoole, the elder, made his will, dated the of April, 1811, and thereby devised the lands of *Lah Ardnakelly*, and *Dough*, with other lands, to *Andrew poole* for life, with the usual powers of leasing, joint and charging, with remainder to the heirs male of his with remainder to *Hugh Stackpoole* for life, with remainder to the heirs male of his body ; remainder to *William Stackpoole* for life, with remainders to the heirs male of his body ; remainder to *Matthias Stackpoole* for life remainders to his sons in tail male, remainder to test right heirs. And the said testator thereby devised the of *Ballyvorda*, *Ballybyan*, and *Ballyea*, and also the of *Rannah*, to *Hugh Stackpoole* for life, with remainder to the heirs male of his body ; with remainder to *William Stackpoole* for life, with remainders to the heirs male of his body ; with remainder to *Michael Stackpoole* for life remainders to the heirs male of his body ; with remainder to *Matthias Stackpoole* for life, with remainders to the male of his body ; with remainder to *Andrew Stackpoole* for life with remainders to the heirs male of his body, with re

der to testator's right heirs. And the said testator thereby devised the lands of Craigbrien, Dromquin, and Forrour, after the decease of his wife, and subject to 7000*l.*, to *George Stackpoole*, the younger, for his life, remainder to trustees to preserve, &c., remainder to his first and other sons in tail male, remainder to *Andrew Stackpoole* for life, remainder to trustees to preserve, &c., remainder to his first and other sons in tail male, with remainders over; and the said testator, after reciting the settlement of the 8th of June, 1803, and the contingent reversion in the lands of Mountcashel, to which he was entitled, thereby devised the said reversion, when such contingency should occur, to *William Henry Stackpoole* for life, remainder to trustees to preserve, &c., remainder to his first and other sons in tail male, with remainders over to the other sons of the testator, and their issue male, remainder to testator's right heirs.

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The will then proceeded as follows: "And whereas, by my marriage settlement I have power to appoint the lands of Ballyfadeen, Moymore, and Knockersceagh, in the barony of Corcomroe, in said county (which I hold under a lease for three lives, renewable for ever, made by the late Earl of *Carrick*, subject to the yearly rent of 122*l.*), to the use and for the benefit of such of my sons by my present wife as I should think fit, and to make such appointment by my last will, subject, however, to an annuity of 100*l.* for my said wife during her life, in case she shall survive me; I now, therefore, in exercise of the power so vested in me as aforesaid, appoint, give, and devise the said lands of Ballyfadeen, Moymore, and Knockersceagh, to said *Hugh Lord Massy* and his heirs, in trust, and to the several uses and purposes herein mentioned; that is to say, the said lands of Ballyfadeen and Moymore (subject to 80*l.*, part

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of said head rent of 122l.) to the use of my third son, *Matthias Stackpoole*, for and during his natural life, remainder to the said *Hugh Lord Massy* and his heirs, in trust to support the contingent remainders hereinafter limited, from being barred or destroyed, and for that purpose to make entries and bring actions as the case may require; but to permit the said *Matthias Stackpoole* to receive the rent and profits thereof, during his natural life; and from and after the decease of the said *Matthias Stackpoole*, remainder of said lands of Ballyfadeen and Moymore, to the use of the first and every other son and sons of the body of the said *Matthias Stackpoole*, lawfully to be begotten, successively, as they shall be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body always to be preferred, and to take before the younger and the heirs male of his body; and for default of such issue remainder of said lands of Ballyfadeen and Moymore, together with the said lands of Knockersceagh (which I now hereby give, devise, and appoint, immediately after my death, subject to the payment of 42l., part of said outgoing head rent of 122l.), to the use and behoof of my sixth son *Michael Stackpoole*, for and during the term of his natural life." The testator then appointed the said lands of Ballyfadeen, Moymore, and Knockersceagh, to *Hugh Lord Massy*, during the life of *Michael Stackpoole*, to preserve contingent remainders, and after the death of *Michael Stackpoole* to his first and other sons successively in tail male and after the death of *Michael Stackpoole*, he gave similar remainders to *William Henry Stackpoole* and *Andrew Stackpoole*, and their first and other sons in tail successively with remainder to his own right heirs.

The testator, *George Stackpoole*, the elder, afterwards

made a codicil to his said will, dated the 21st of November, 1811, and thereby directed "in case my eldest son, *George Stackpoole*, shall die without leaving a son of his body, lawfully issuing, living at the time of his death, or of which his wife shall be then *enciente*, whereby my second son, *Andrew Stackpoole*, if then living, or his son *George*, or any other son or grandson of said *Andrew*, will be entitled and succeed unto the several estates in my said son *George's* marriage settlement, and as same are, in such event, limited to said *Andrew* and his issue male, and as the said *Andrew*, if then living, or his son *George*, or other son or grandson of the said *Andrew*, will, in such event, succeed to the lands of Cragbrien, Dromquin, and Forour, under the devise thereof in my said will contained; in such event I hereby revoke the devise made to him, the said *Andrew*, in and by my said will, of said lands of Lahensy, Ardnakelly, and Dough. And in case my son, *Major Hugh Stackpoole*, shall be living at the time of my son, the said *George's*, death, without male issue as aforesaid, I devise and bequeath, in these events, the said lands of Lahensy, Ardnakelly, and Dough, to the said *Hugh Stackpoole*, and the heirs male of his body, lawfully issuing, (subject to 200*l.* a year of the head rent, payable to my landlord thereout, and subject to the said annuity for the said *Michael*), in lieu and in exchange for the lands of Ballyvorda, Ballybyan, and Ballyea, and Rannah, which I devised to him by my said will. But in case my said son *Hugh* shall not be living at the time of the decease of my said son *George*, without issue male as aforesaid, and if my son, *William Henry Stackpoole*, shall be then living, then, in that event, I devise the said lands of Lahensy, Ardnakelly, and Dough (subject to said proportion of the head rent and said annuity), to him, the said *William Henry*

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Stackpoole, and the heirs male of his body, lawfully issuing. But in case my said son *William* shall not be living at the time of the decease of my said son *George*, without male issue as aforesaid, then, in that event, if my said son, *Michael Stackpoole*, shall be then living, I devise the said lands of Lahensy, Ardnakelly, and Dough, to him, the said, *Michael* and the heirs male of his body, lawfully issuing. And also devise the said lands of Ballyvorda, Ballybyan, and Ballyea (subject to 100*l.* a year of my said landlord's rent and also the said lands of Rannah, to my said son *Michael* if he shall be living at the time of the death of my said son *George*, without issue male, as aforesaid, and to the heirs male of the said *Michael's* body, lawfully issuing, in lieu and exchange for the lands of Knockersceagh, devised to him by my said will. And if my said son, *Matthias Stackpoole*, shall be living at the time of the said *George's* death, without issue male, as aforesaid, then I devise the said last-mentioned lands of Knockersceagh and Rannah, to the said *Matthias* and the heirs male of his body, lawfully issuing, and as to the said lands of Ballyvorda, Ballybyan, and Ballyea, upon the event of the said *Michael's* death, or upon the event of his not succeeding to the said lands, I devise and bequeath said last-mentioned lands to the said *William Henry Stackpoole* and his heirs male, with remainder to the said *Matthias Stackpoole* and his heirs male."

The said testator, *George Stackpoole*, the elder, afterwards added a second codicil, dated the 5th of September 1812, which did not disturb in effect the dispositions and limitations made by his will and first codicil as above stated. Shortly afterwards, in the year 1813, the said testator died without having altered or revoked his said will and codicil, and thereupon *Matthias Stackpoole* entered into possession of the lands of Moymore and Ballyfadeen.

By indenture dated the 19th of July, 1814, and made between *Hugh Stackpoole* of the one part, and *Anthony Hogan* of the other part, *Hugh Stackpoole* released to *Anthony Hogan* the lands of Ballyvorda, Ballybyan, Ballyea, and Rannah, for the purpose of barring the quasi entail of those lands.

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By indenture dated the 15th of September, 1815, made between *Matthias Stackpoole* of the first part, *Thomas Pilkington* of the second part, *Ellen Pilkington* of the third part, and trustees of the fourth and fifth parts, being the settlement executed upon the marriage of *Matthias Stackpoole* with *Ellen Pilkington*, after reciting that under a lease made in the year 1805, *Matthias* was seised of an estate for three lives, in part of the lands of Moymore and Ballyfadeen, and that his father, the said *George Stackpoole* the elder, had devised the lands of Moymore and Ballyfadeen to him for life, with remainder to his first and other sons ; and further reciting that under the same will *Matthias* would become, upon certain contingencies, entitled to the lands of Rannah and Knockersceagh, it was witnessed that *Matthias Stackpoole* limited the said lands of Moymore, Ballyfadeen, Rannah, and Knockersceagh, and all the right, title, and interest of the said *Matthias* therein, to the use of *Matthias* for life, remainder, subject to a jointure for his intended wife, to the first and other sons of the marriage successively in tail male, with remainder, as to the lands of Rannah and Knockersceagh, to the daughters of the marriage as tenants in common ; and as to the lands of Moymore and Ballyfadeen, to *Michael Stackpoole* for life, with remainder to his first and other sons, with similar limitations successively to *William Henry Stackpoole*, *Hugh Stackpoole*, and *Andrew Stackpoole*, the

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other brothers of *Matthias*, and their respective sons, with an ultimate remainder to *Matthias* in fee: and by this deed *Matthias*, after reciting that in case he should become entitled to the lands of Rannah and Knockersceagh, he would be only seised of an estate tail therein, covenanted to levy fines and suffer recoveries to enure to the uses of this settlement.

The marriage took effect, and there was issue two sons; and *Ellen Stackpoole*, the wife, died sometime previously to the year 1827, leaving her husband, *Matthias*, her surviving.

By marriage articles, dated the 11th of June, 1827, executed upon the occasion of the intermarriage of *Matthias Stackpoole* and *Louisa Mary M'Namara*, after reciting that by the settlement of 1815, the lands of Moymore, Ballyfadeen, Rannah, and Knockersceagh, had been settled on *Matthias Stackpoole* for life, with remainder to his first and other sons by *Ellen Pilkington*, and that the said *Matthias* then had a life estate in said lands, with a reversion expectant upon the failure of his issue male by said *Ellen Pilkington*, the said *Matthias Stackpoole* covenanted that, in case of the decease of his sons by *Ellen Pilkington* without issue male, he would settle the lands of Moymore, Ballyfadeen, Rannah, and Knockersceagh to secure a jointure for his then intended wife, *Louisa Mary M'Namara*, and subject thereto, to the use of the first and other sons of the marriage successively in tail male, with remainder to the daughters of the marriage as tenants in common in fee.

There were issue of this marriage two daughters, *Sarah Jane* and *Mary Louisa Stackpoole*, the Plaintiffs in the present cause.

Matthias Stackpoole died in 1835, and his sons, the issue male of his first marriage, died, one in 1834, the other in 1840, and both under age and without issue.

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George Stackpoole, the younger, died without issue in the year 1816, and the shifting limitations, which, under the will of *George Stackpoole* the elder, were contingent on that event, then took effect, and accordingly the estate tail of *Michael Stackpoole* in the lands of Knockersceagh ceased, and the lands became vested in *Matthias* and his issue. *Michael Stackpoole*, however, continued in possession of the lands of Knockersceagh. *Hugh Stackpoole* died in 1840, previously to the decease of the survivor of the sons of *Matthias Stackpoole*, having made his will in the year 1838, and thereby devised the lands of Ballyvorda, Bally-byan, Ballyea, and Rannah, to *William Henry Stackpoole* and his heirs, and bequeathed a legacy of 1400*l.* to the daughters of *Matthias Stackpoole*.

At the time *George Stackpoole* the elder made his will above stated, his title to the lands of Clonroad and the Liffords was disputed, and subsequently to his decease, was evicted by a decree of the House of Lords, made in a cause of *Gore v. Stackpoole(a)*.

The lands of Cragbrien, Dromquin, and Forrour, after they came into the possession of *Andrew Stackpoole*, were sold under a decree of the Court of Chancery, in the cause of *William Henry Stackpoole v. Andrew Stackpoole* and others, which had been instituted for the purpose of raising family charges.

(a) 1 Dow, 18.

1843. Renewals of the leases, under which the lands of Ballyfadeen, Knockersceagh, and Rannah were
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 v. pursuant to the covenants in those leases, were executed
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 Statement. 1816, and the legal estate, which had vested in the trustees of that settlement, had determined previously to the passing of the bill in the present cause.

The original bill in this cause was filed on the 7th of October, 1841, shortly after the decease of the surviving sons of *Matthias Stackpoole*, by *Sarah Jane*, and *Louisa Stackpoole*, his daughters, against *William E. Stackpoole*, *Michael Stackpoole*, *Andrew Stackpoole*, *William* his eldest son, and other parties, Defendants. The bill prayed, that the collateral limitations in favour of the brothers of *Matthias Stackpoole* contained in the settlement of the 15th of September, 1815, might be declared fraudulent and void as against the Plaintiffs, and that the articles of the 11th of June, 1827, might be carried into execution, and proper conveyances of the lands of Moy Ballyfadeen, Knockersceagh, and Rannah, executing according to the trusts of those articles, the Plaintiffs all claimed, that the collateral limitations of the former instrument were voluntary, and that they were purchasers for valuable consideration under the latter deed.

The bill was subsequently amended, upon discovery of the disentailing deed of 1814, by expunging that part of the bill, which asked for relief in respect of the lands of Rannah.

The Defendant, *Andrew Stackpoole*, by his answer stated that having been advised that, under the will of his father

George Stackpoole, the elder, he was entitled, *quasi* in tail, to the lands of Lahensy, Ardnakelly, and Dough, he had, by indentures dated the 10th and 11th of July, 1814, barred the entail and all the limitations over. *Andrew* also insisted that the appointment intended to be made by the will and codicil of *George Stackpoole* the elder, of the lands of Moymore, Ballyfadeen, and Knockersceagh, was bad, as being an excessive execution of the power contained in the settlement of the 8th of October, 1767.

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The Defendant, *William Henry Stackpoole*, by his answer submitted, that although *George Stackpoole*, the younger, had died without issue male, yet the estates of *Michael Stackpoole* in Rannah, and of *Michael* and *Hugh* in Rannah and Knockersceagh, appointed to them under the will and first codicil of *George Stackpoole* the elder, did not determine upon that event, for that upon the true construction of the shifting cause in that codicil, and of the settlement of the 8th of June, 1803, no cesser was to take place, unless, upon the death of *George Stackpoole* the younger, without issue, *Andrew Stackpoole* should succeed to the actual enjoyment of the lands of Clonroad and the Liffords, mentioned in the settlement of the 14th of January, 1802, which did not happen, in consequence of the decree in *Gore v. Stackpoole* above mentioned. *William Henry Stackpoole* further insisted, that the limitations to the brothers of *Matthias* contained in the settlement of 1815 were not voluntary; that that settlement operated as a covenant by *Matthias Stackpoole* to stand seised for the uses contained therein, and was binding upon the Plaintiffs claiming under the articles of 1827, *Louisa Mary M'Namara* having had full notice of the deed of 1815.

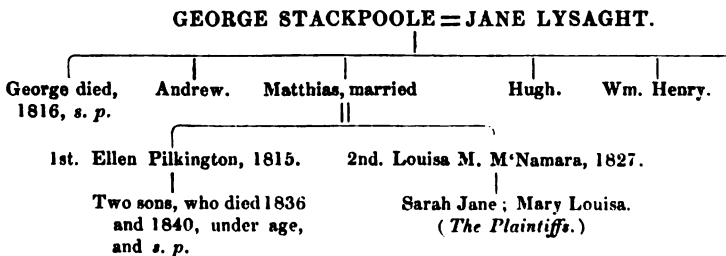
1843. *Michael Stackpoole*, by his answer, relied on his
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 turbed possession of the lands of Knockersceagh, at
 time of the decease of *George Stackpoole* the younger,
 1816, and claimed the benefit of the Statute of
 Wills, 3 & 4 Will. IV. c. 27, as a bar to the demands of the
 Plaintiffs(a).

Argument. Mr. Moore, Mr. O'Brien, and Mr. Lysaght,
 Plaintiffs.

The Plaintiffs' demands in this case are, firstly
 the lands of Moymore and Ballyfadeen, and secondly
 the lands of Knockersceagh. The former claim depends
 on the construction of the will of *George Stackpoole*, the
 deceased, considered as an execution of the power given by
 the will of 1767, and on the effect of the settlement of 1827
 articles of 1827. The latter claim involves the construction
 of the shifting clause in the first codicil of
Stackpoole's will, and of the lapse of time since the
 decease of *George Stackpoole*, the younger, in the year

It must be conceded that the settlement of 1767
 authorized an appointment to the grand-children of the
 testator, the donee of the power. The appointment is

(a) PEDIGREE.



this case was, therefore, excessive and bad, unless it can be sustained and modelled by some principle of equitable construction. Such a principle is, however, to be found in the *cy près* doctrine, a doctrine invented and established to support the paramount intentions of testators, and clearly, as we submit, applicable to the present case. The general intention of the testator was to appoint in favour of *Matthias* and his issue male; he has attempted to effectuate that intention by a particular mode of limitation, exceeding the powers with which he was invested; this Court will, therefore, interpose; the mode of limitation must be sacrificed, that the objects of the limitation may not. *Matthias* must be held to have taken an estate in tail, and thus the general intention of the testator, and the directions of the settlor, will be both accomplished and obeyed. It is plain that the testator never intended any one else to take a benefit, until the extinction of all the male issue of *Matthias*. If this were the case of a mere ordinary will, there could not be a doubt as to the applicability of the doctrine, and there is neither principle nor authority that any distinction should, in this respect, obtain, in the case of a will intended to operate as an execution of a power. The doctrine of *cy près*, it is true, has been questioned and disapproved of by some Judges, but notwithstanding such disapprobation, the doctrine, like many other principles of law once questioned, is now too well settled, and rests on too high authority to be shaken. It is universally admitted that *stare decisis* is one of the most useful rules. In *Chapman v. Brown*(a), the testator devised to the second son of his brother *Reginald* (he having, at the testator's decease, but one son), for his life, and after his decease to the first

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(a) 3 Burr. 1626; 3 Bro. P. C. 269, Toml. Ed.

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son of that second son, and the heirs male of the body of such second son : the Court held that the second son took an estate in tail male. The case of *Nicholl v. Nicholl*(a) followed : there the devise was to the second son of *W. Nicholl* (who, at the death of the testator, had no son), for his life, and after his death, or in case he should inherit the paternal estate by the death of his brother, to his second son, lawfully to be begotten, and his heirs male, remainder to the third and other sons of *W. Nicholl* successively, in tail male, remainder over ; the Common Pleas, in a case sent from Chancery, certified that the estate would vest in the second son by way of executory devise, and that, in order to effectuate the general intent of the testator, he would take an estate in tail male, determinable on the accession of the paternal estate. In that case the particular intention could not be effectuated, because of the rule of law which forbids limitations to the issue of an unborn child, therefore the Court gave the unborn child an estate tail ; so here, the children of *Matthias* were not immediate objects of the power, therefore the Court will give *Matthias* himself an estate tail. In *Robinson v. Hardcastle*(b) it was not necessary to decide the point, but Mr. Justice *Buller* expressed an opinion in favour of the application of the doctrine.

In *Pitt v. Jackson*(c), decided by Lord *Kenyon* when Master of the Rolls, by a marriage settlement certain monies were directed to be expended in the purchase of lands, to be settled on *P. W.* for life, with remainder to the children of the marriage, subject to such powers, limitations, and

(a) 2 W. Bl. 1159.

(c) 2 Bro. C. C. 51.

(b) 2 Term R. 241, 380, 781.

provisions as *P. W.* should appoint. By his will *P. W.* appointed the monies to be laid out in real estate, to be conveyed in trust for his daughter *M.*, during her life, for her separate use, remainder to trustees to preserve, &c., remainder to all and every the child and children of his said daughter, as tenants in common, with remainders over. The Court, to effectuate the testator's general intention, gave the daughter an estate tail. Here then the doctrine was applied, although, as Mr. *Butler* observes(*a*), "the course and order of devolution of the land, in consequence of the ancestors taking an estate tail under the *cy près* doctrine, would be materially different from that, in which the lands would have moved, if the devise had been construed according to its literal import." In *Griffith v. Harrison*(*b*) a similar question arose upon a power; and in a case sent by the Court of Chancery to the King's Bench, Lord *Kenyon*, and Mr. Justice *Grose* certified, that the doctrine of *cy près* applied; Mr. Justice *Ashurst*, and Mr. Justice *Buller*, indeed, returned a different certificate, but upon grounds not inconsistent with, or unfavourable to the doctrine. In *Routledge v. Dorril*(*c*), Lord *Alvanley* expressed his assent to the same doctrine.

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These cases are amply sufficient to shew that the doctrine is well established, and applicable to the present case; it must, therefore, be considered that *Matthias* took an estate in tail male in the lands of Moymore and Ballyfadeen. This estate was, however, only *quasi* in tail, being of lands held under leases for lives, renewable for ever, and was therefore barred by the settlement of 1815. The title of the Plain-

(*a*) *Fearne* 207, (n), 9th. ed. (c) 2 *Ves.* 357, 364.
(*b*) 4 *Term R.* 737; 3 *Bro. C. C.* 410.

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tiffs, then, to these lands is derived under the articles of 1827. These articles were entered into upon the marriage of the Plaintiffs' mother, they are consequently purchasers for valuable consideration of the estates thereby limited to them. On the other hand, the right of the Defendants depends upon the limitations in the settlement of 1815, to the brother of *Matthias*, the settlor. But as they were purely voluntary, the articles of 1827 must prevail, and the title of the Plaintiffs be considered the better one. In *Johnson v. Legard*(a) the Court of King's Bench held, that limitations to collaterals in a marriage settlement were not entitled to the benefit accruing from the consideration of marriage, and were void as against a subsequent purchaser for valuable consideration. That was a case sent out of Chancery, and Sir *John Leach* acted upon the certificate. Here, indeed, the matter rested in contract, while in *Johnson v. Legard* the Court was dealing with legal estates; but that cannot make any difference in this Court, which treats a contract for a purchase as an equitable title, and regards the party having such a title as the complete owner of the estate, *Buckle v. Mitchell*(b). Notice of a prior voluntary deed is quite immaterial as regards a subsequent purchaser for valuable consideration, *Evelyn v. Templar*(c).

With regard to the lands of Knockersceagh, the Plaintiffs' title is based on the shifting clause in the first codicil to *George Stackpoole's* will. The event, upon which that clause was to take effect, and these lands go over to *Matthias Stackpoole*, viz., the decease of *George*, the younger, without issue, happened in 1816, and the Plaintiffs' right

(a) 3 Madd. 283.

(c) 2 Bro. C. C. 148.

(b) 18 Ves. 100.

seems indisputable, unless barred by the Statute of Limitations. But the Statute does not apply, because by the deed of the 15th of September, 1815, these very lands were settled, and by the settlement *Matthias's* estate was cut down to a mere estate for life; the Statute did not begin to run until 1816; therefore, although a good bar may have arisen to the assertion of *Matthias's* life estate, no bar can exist to the Plaintiffs' rights, which did not, in point of fact, accrue until the decease of *Matthias's* surviving son, in the year 1840, only a few months previous to the filing of this bill. The Defendants, who claim under the deed of 1815, are thereby estopped from setting up any claim adverse to that settlement, *Bensley v. Burdon*(a).

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The *Solicitor-General*, Mr. *Pigot*, and Sir C. M. *O'Loghlen*, for the Defendant, *Andrew Stackpoole*.

Mr. *Serjeant Warren*, Mr. *William Brooke*, and Mr. *Brereton*, for the Defendants, *William Henry Stackpoole*, and *Michael Stackpoole*(b).

The settlement of 1767 confessedly did not authorize any appointment to the sons of the donee's children. The appointment, therefore, to the sons of *Matthias* was void, and if, as it is submitted, *Matthias* took only an estate for life, according to the terms of the appointment, then *Andrew's* title accrued, as first tenant in tail, under the gift in default of appointment.

(a) 2 Sim. & S. 519.

(b) The Reporters have considered it desirable to give the arguments for the Defendants in

one connected form, although the Defendants were differently interested in the questions discussed.

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The doctrine of *cy près* cannot be applied to the doctrine itself is one resting upon doubtful and able authority. It is only applicable to cases of trusts, cases in which something remains to be done Court. *Humberston v. Humberston*(a), and *Pittson*(b), were both cases of executory trusts, and indeed of them can be considered as decisions clearly dependent upon the doctrine in question, to which, however, they have been generally referred. In *Robinson v. Hardcastle*(c), it was not called upon to decide the point. In *G. Harrison*(d), the Judges were equally divided. In the early cases of *Chapman v. Brown*(e), and *Nicholls*(f), where both upon the construction of will limitations in both of those cases were invalid, as in violation of the rule against perpetuities; but the Court, in favour of the intention, so moulded the limitations as to support the gifts. It is a much stronger measure to apply the doctrine to an excessive execution of a power than to apply it to the case of a will for the purpose of giving effect to the general intention of a testator. In the latter case the party is the absolute owner of the property, and is at liberty to dispose of it in any manner he thinks fit, provided he does not attempt to interfere with the policy of the law upon the subject of perpetuities; and in such a case perhaps, the Court might reasonably give a liberal construction to the words of disposition, for the sake of the intention of the disposer. But the case of a power is very different, where the donor of the power has defined the limits

(a) 1 P. Wms. 332; 2 Vern. 737; (c) 3 Burr. 1626.
 Prec. Chan. 455; Gilb. Eq. Ca. (d) 2 W. Bl. 1159.
 128; 1 Eq. Ca. Abr. 207. (e) 2 Term R. 241, 30.
 (b) 2 Bro. C. C. 51. (f) 4 Term R. 737.

which it is to be exercised, and outside those limits he has himself determined the disposition of the property. *Pitt v. Jackson* must be considered as the sole authority for the application of the cy près doctrine to powers; and the decision of Lord *Kenyon* in that case was subsequently reversed by Lord *Loughborough*, reversed certainly, it must be admitted, on grounds not affecting the cy près doctrine; *Smith v. Lord Camelford*(a). In *Brudenel v. Elwes*(b), Lord *Kenyon* himself admits that *Pitt v. Jackson* carried the doctrine to the extreme verge of the law; and this remark was repeated, and acquiesced in by Lord *Eldon*, in the same case in Chancery(c). The general current of subsequent authorities flows against the doctrine. In *Routledge v. Dorril*(d) the Court refused to apply it to limitations of personal estate. Nor is it applicable where the limitation to the unborn children is in fee-simple, *Bristowe v. Ward*(e); which latter case also shews, that whether the general doctrine be or be not well-founded, it only applies where it will effectuate what the Court considers the general intention of the testator. Here an estate tail in the son would give him the same power as an estate in fee-simple, for the lands were held *pur autre vie*. In *Seaward v. Willock*(f), where the language of the will was strongly contended to afford ground for its application, the doctrine was rejected. Mr. *Butler*, in his valuable note(g), observes that no case has been decided, in which it has been applied to limitations in a deed, and he concludes his observations on the cases by saying, "that in practice it should not be acted on without a considerable degree of consideration."

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(a) 2 Ves. 698.

(b) 1 East, 442, 451.

(c) 7 Ves. 382, 390.

(d) 9 Ves. 264

(e) 2 Ves. 136.

(f) 5 East, 198.

(g) Fearn 205 (n.), 9th. ed.

1843. In an unreported case which came before Lord *Redesda*
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 v. opinion that the cy près doctrine was only applicable
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Assuming, however, that the Court would apply the cy près doctrine to the present case, and give *Matthias* an estate tail, still the Plaintiffs' rights arising under the deed of 1827, cannot prevail against those created by the previous settlement of 1815, and vested in *Matthias*' brothers. It was admitted that the limitations to the settlor's brothers were not within the marriage contract, and that in *Johnston v. Legard*(a), the Court of King's Bench returned a certificate, that such limitations were invalid as against a subsequent purchaser for valuable consideration, claiming under an actual conveyance. But although Sir *John Leach* acted on that certificate, and made a decree for the Plaintiff, when the case subsequently came before Lord *Eldon*(b), and appeared to be the case of a bill filed for the purpose of carrying into execution a contract of sale entered into by the person, who had created those collateral limitations, he dismissed the bill. The case, therefore, is really a distinct authority against the Plaintiffs on the point; for here, where the instrument under which the Plaintiffs derive their claim is a mere executory contract, the specific performance of which is now sought as against parties entitled to succeed to the estates under the previous settlement of 1815, limited to the person under whom they claim, and of which they had full notice. As to the lands of Rannah, the Plaintiffs abandoned their claim, and amended the bill according

(a) 3 Madd. 283.

(b) Turn. & R. 281.

With regard to the lands of Knockersceagh, the event did not happen on which the shifting limitation was to take effect. The codicil consists of a series of shifting uses, and each link must be construed to depend on all the preceding. Now the first shifting limitation is plainly conditional on *Andrew's* succeeding to the lands of Clonroad and the Liffords, of Cragbrien, &c. It was not to take effect simply upon the decease of *George Stackpoole*, the younger, without issue, but upon that event, combined with the possession of *Andrew*; and so of all the subsequent shifting limitations. Now this cumulative event never happened, for the lands of Clonroad and the Liffords, instead of being enjoyed by *Andrew*, were evicted by title paramount in the cause of *Gore v. Stackpoole(a)*, and the lands of Cragbrien, &c., were sold under the decree in *Stackpoole v. Stackpoole*, for raising family charges. The different estates, therefore, not having devolved in the manner contemplated and provided for by the testator, the shifting clause has no operation, *Fazakerly v. Ford(b)*. Again, this shifting use, being limited to take effect in defeazance of the previous estate tail given to *Hugh Stackpoole*, was destroyed by the disentailing deed of 1841; *Page v. Hayward(c)*, *Doe v. The Earl of Scarborough(d)*. Lastly, the claim of the Plaintiffs to these lands is unquestionably barred by the late Statute of Limitations, 3 & 4 Will. IV. c. 27. It is admitted that *Michael Stackpoole* has been in possession for more than twenty years: the right of *Matthias* accrued, if at all, in 1816; *Matthias* and the trustees of the settlement of 1815 were therefore barred, and the Plaintiffs cannot be in a better position. No new rights could be created by the settle-

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(a) 1 Dow, 18.

(c) 2 Salk. 570; Pig. Rec. 176.

(b) 4 Sim. 390; 1 Adol. & E.; (d) 3 Adol. & E. 2, 897.

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ment of 1815, so as to accrue at periods subsequent to 1816. The doctrine of estoppel has no application. The deed, in fact, could not operate by way of estoppel. In the first place, it was a settlement by lease and release, and is now clear, that such a conveyance, being an innocent conveyance, as it is termed, cannot have any such operative effect. *Right v. Bucknell(a)*, overruling *Bensley v. Burdon* (b); secondly, the settlement itself disclosed the whole truth of the case, and the fact that the title of *Matthias* depended upon a contingency, and purported only to convey a possibility. No question of estoppel, therefore, can arise. *Co. Litt.(c)*, *Com. Dig.(d)*, *Foster v. Blake(e)*, *The Earl of Kent v. Steward(f)*.

Mr. James O'Brien, in reply.

There is no foundation for the distinction taken by the Defendants as to the application of the *cy près* doctrine. The cases already referred to shew that it is applicable without distinction to legal estates and executory trusts; simple devises and appointments under powers; *Nichol Nicholl(g)* was the case of a trust executed; *Pitt Jackson(h)*, and *Griffith v. Harrison(i)*, were both arising upon the execution of powers. The doctrine, then, rests upon the highest authority; and though it is true that Lord Eldon did, in *Brudenel v. Elwes(k)*, make use of an expression referred to, yet it cannot be said that he thereby intended to convey his disapprobation of the doctrine. The nature of the peculiar tenure here cannot at all embarrass

(a) 2 B. & Adol. 278.

(b) 2 Sim. & S. 519.

(c) 352 a. (n. 1), 352 b.

(d) Tit. Estoppel (E. 2).

(e) 2 Ball & B. 387; 4 Bligh,

O. S. 140.

(f) Cro. Car. 358.

(g) 2 W. Bl. 1159.

(h) 2 Bro. C. C. 51.

(i) 4 Term R. 737.

(k) 7 Ves. 382.

Plaintiffs' case, for the *quasi* estate tail would devolve on the son, just as a life estate in lands of inheritance : an act or deed to bar the issue being equally necessary in both cases.

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As to *Johnson v. Legard*, it is true that the decision of Sir John Leach was reversed by Lord Eldon, but upon grounds quite consistent with the principle upon which the Plaintiffs rely. The ground of the reversal was simply this, that subsequent transactions might have had the effect of confirming those limitations to collaterals, and that the Court would not compel a purchaser to take a title so doubtful, as, under all the circumstances, was there offered to him.

The shifting clause in the codicil must be held to have operated. The lands were sold to raise a charge, subject to which the testator must have contemplated that the lands would be taken. In *Fazakerly v. Ford*(a) the shifting clause was to take effect, provided other estates came into possession ; that was the event expressly provided for, and which did not happen. Here the event named was the death of *George* without issue, which did happen : *Doe v. The Earl of Scarborough*(b) has not any application to the present case. That case only decided that a limitation expectant upon an estate tail, which, upon the happening of a particular event, was to be accelerated, was defeated by a recovery suffered by the prior tenant in tail ; and that the Plaintiff, therefore, claiming under that limitation, had no title to recover. In this case the shifting clause in the codicil substituted another estate, which was to arise upon

(a) 4 Sim. 390 ; 1 Adol. & E. 897. (b) 3 Adol. & E. 2, 897.

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a particular event. That event happened, it is true, in 1816 ; but the prior settlement of 1815 prevented the Statute from beginning to run, as against the Plaintiffs, until the accruing of their rights, which did not, in fact, arise until the death of the issue male of the first marriage of *Matthias*.

Judgment. THE LORD CHANCELLOR having inquired whether the parties wished that he should himself decide the questions which had been raised, or that he should send a case to a Court of Law ; and being informed that it was the general wish that his Lordship should decide the case at once, proceeded as follows :—

I am not aware that it would be worth while to reserve my judgment in this case for a future day. The questions which have been discussed at the bar have so frequently engaged my attention, that I do not think further reflection would enable me to form a more satisfactory opinion than that which I am about to express.

As far as the lands of Knockersceagh are concerned, the case depends upon the Statute of Limitations. As to the two remaining denominations, the case depends upon several questions of great nicety.

I shall first dispose of the claim to the lands of Knockersceagh. In 1816 the event happened upon which the estate ought to have gone over, if the Plaintiffs' title took effect at all ; and at that time a party was in possession, in favour of whose possession time would be a bar, and that

ever since continued in possession. If *Matthias* entered into a settlement previously to 1816, right is supposed to have accrued, time would run to run, and his estate would have been barred, admitted, that after the Statute has once begun a party cannot, by putting his estate into settlement, raise up new rights, and give new claims to persons under the settlement. I have, therefore, to consider it was the operation of the instrument executed in which, it is said, the rights are saved, and the bar of the Statute prevented. That deed only intended to deal with the mere possibility, which the party had in the estate, as is set forth in the deed; and if anything turned upon the mode in which the party dealt with that interest, it shews that it was treated such as it really was. The deed demonstrates that the settlor was perfectly aware of the nature of his interest, that it was a mere possibility. The deed does not profess to operate as a conveyance of any estate in fee, and it clearly could not operate by estoppel, or by transfer. This was settled by *Right v. Buck*, which decided, that a conveyance by lease and release, of an innocent conveyance, could not work by the operation of a doctrine which had been universally held by all the learned lawyers, previously to the case of *Bensley v. Bensley*. The deed of 1815 could not pass any estate. It was intended to give legal effect to the limitations contained in it, as far as his interest extended; but I am unable to understand how it could create any new estate, or save the bar of the Statute of Limitations. The estate in existence was his estate, whatever it was, and it was equitably bound by the agreement.

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But there is a still greater difficulty in this case; for the Plaintiffs, claiming under the marriage articles executed 1827, claim that, which was not included in the settlement of 1815; and whatever interest was not included in the deed of 1815 remained in the settlor as an old reversionary interest. Now, I am not embarrassed with claims under the settlement of 1815, for all the limitations of that instrument, as to this estate, have been exhausted; and as no person can claim under the deed of 1827, except as deriving under the settlor, and, consequently, cannot claim any higher right than he had, and as it is clear that the Statute effected its purpose against every estate vested in him, it follows, that the Plaintiffs, who derive under the deed of 1827, are barred by the Statute. I am, therefore, clearly of opinion that as to the lands of Knockersceagh the Plaintiffs have no title.

As to the two other denominations of these lands, the rights of the parties depend upon questions of the greatest nicety and difficulty. The first of these questions is, whether the *cy près* doctrine can be applied to the execution of a power. The power, in this case, authorized the tenant for life to appoint certain lands to his sons for estates, not exceeding estates tail; and the question is, whether he could under that power, by will—(it is admitted, that by deed he could not)—raise an estate tail in a son, by devising the estate to this son for life, with remainder to trustees to preserve with remainder to his first and other sons in tail male. In terms, the power did not authorize an appointment to any person except the sons of the donee of the power; it neither authorized the intermediate limitation to the trustees, nor the appointment to the grandsons as purchasers. But it was argued, that although the son could not, under the power

take an estate for life, with remainder to his sons as purchasers, yet that, by the application of the *cy près doctrine*, that son might take an estate in tail male, and that if such an effect were given to the will, the general intent would be effectuated, and all the sons of the son and their male issue would take the same estates, as if the power had been strictly followed. It is true that, if I adopt this construction, I put it in the power of the son to prevent the estate from going to his sons ; for at any time, by pursuing the proper forms, he may bar the estate tail, and dispose of the estate as he pleases. But, on the other hand, if I do not adopt that construction, I defeat the intention of the testator, for upon the death of the son, the estate will go away to collateral branches of the family, and his issue never can take; whereas, by the other construction, unless the son bar the entail, the estate will descend to all the issue for whom the testator intended to provide.

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The cases upon the doctrine go thus far. In *Chapman v. Brown*(a), certain words had been omitted in the will by accident. The Court of King's Bench took advantage of the omission in order to give an estate tail to the person who was capable of taking it according to the rules of law, from whom it would descend to the persons who would have taken by purchase, if there had been no mistake in the will. The construction which the Court adopted was ingenious, and opinions were expressed by the Judges who decided that case, that the limitations might have been supported by the application of the doctrine now contended for. This is explained by Lord *Alvanley* in *Routledge v. Dorril*(b). The objection to the limitations, however, was

(a) 3 Burr. 1626; 3 Bro. P. C. (b) 2 Ves. 364, 365.
269, Toml. Ed.

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not that they were an improper execution of a power, for the devise was of an interest, but that they were void, as being contrary to the general rule of law. In *Nicholl v. Nicholl*(a) the exact point arose, and a case was sent for the opinion of a Court of law. The Judges certified in favour of the application of the cy près doctrine to the construction of the limitations there. This also was the devise of an estate, and not an execution of a power; but a will executed under a power is, within the limits of the power, to have the same favourable construction as a proper will; accordingly, in *Pitt v. Jackson*(b), which depended upon the execution of a power by will, Lord *Kenyon* laid down the same doctrine clearly and decisively, although it ultimately appeared that it was not necessary to decide the point, either when the cause was first heard at the Rolls before Lord *Kenyon*, or when it subsequently, under the name of *Smith v. Lord Camelford*(c), came on before Lord *Loughborough*. The rule, however, was distinctly laid down by Lord *Kenyon*, who was one of the most consummate real property lawyers that ever adorned the Bench and he adhered to the opinion he then expressed to the latest moment of his judicial existence. I am aware that the doctrine has been questioned by authorities entitled to the highest respect, but it has never been overruled, and it has been adopted by Lord *Alvanley* and other great authorities. It has been truly said, that the doctrine goes to the very verge of the law, yet no one has ventured to say that it actually breaks in upon any rule of law. In my opinion it is the soundest construction, and I think I ought to act upon that rule in this case; I shall thus be enabled to

(a) 2 W. Bl. 1159.

(c) 2 Ves. 698.

(b) 2 Bro. C. C. 51.

effectuate, to a great extent, the intention of the testator, who had power to do what I now do for him. I do nothing but give effect to a disposition, which, thus construed, will, unquestionably, be within the limits of the testator's power, and which he could himself have framed accordingly, had he been informed what the rule of law was upon the subject. I keep within the terms of the power, and I do not exceed his intention, and there is nothing in the nature of a power like this, as distinguished from property, which should prevent me from applying the doctrine to a devise under the power. I am therefore of opinion, that the *cy près doctrine* ought to be applied to this case, and that by its application, the limitation in question is a valid appointment to the son *quasi* in tail male(a).

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The next question is, as to the effect of the settlement of 1815. It is clear that limitations to collateral relations of the settlor do not fall within the consideration of the marriage. This is a settled rule of law, and I do not think it would be wholesome to discuss the question; I find nothing in the settlement to take it out of the general rule of law in this respect, and I must therefore hold, that the remainders limited in the deed of 1815 to collaterals were voluntary.

Then arises the graver question, as to the articles of 1827, whether they gave the parties claiming under them such a right as now entitles them to call upon this Court to carry them into execution, and thus to defeat the rights of those claiming under the limitations to collaterals in the settlement of 1815. It was argued, that there was no conflict between the two instruments, and undoubtedly if that

(a) See *Vanderplank v. King*, 3 Hare, 1.

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were so, if I found that the settlor intended by the deed of 1827 only to dispose of what had been left unsettled by the deed of 1815, I should not give effect to the second settlement at the expense of the first. But this is not the case. In the settlement of 1827 I find the settlor referring to the previous settlement, and reciting his estate under that settlement thus :—that the lands were settled “on the said *Matthias Stackpoole* for life, with remainder to his first and other sons by *Ellen Pilkington*, his then intended wife, and said *Matthias Stackpoole* by said deed has now an estate for life of and in said lands, with a reversion expectant upon the failure of his issue male by said *Ellen Pilkington*, his first wife.” It is true he does not recite that estate correctly, but still it is stated as if the settlor were the absolute owner of the estate, and that the collateral limitations were nullities. The title is recited in such a manner as to satisfy me, that the settlor himself disregarded the instrument, and treated it as not interfering with the settlement he was then executing, and which could only be effectuated by the destruction of the limitations to the collaterals under the prior instrument of 1815.

The present question, I think, is this: can the Court, as against a legal estate, vested in parties deriving under voluntary limitations in a marriage settlement, give effect to subsequent articles in favour of a purchaser for valuable consideration? No one can be less disposed to give effect to the doctrine contended for than I am. I struggled against it in the case of *Johnson v. Legard(a)*, which case, as decided by the Vice-Chancellor, went farther than it was possible to maintain, and was, indeed, ultimately not supported,

upon appeal before Lord *Eldon*(a), though his opinion was founded upon the particular circumstances of the case.

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I cannot say that the authorities are not in support of the Plaintiffs' doctrine; and the current opinion of the Profession has always been in favour of it. That opinion, is, in my mind, entitled to the greatest respect. I am prepared therefore, to follow the opinion of the Profession, that a subsequent contract for valuable consideration will bind such limitations to collaterals, and that this Court will give effect to such a contract against the preceding limitations in the settlement to collaterals, even though those collaterals had vested legal interests. But I am not embarrassed by such a difficulty in the present case, in pronouncing a decree in favour of those deriving under the settlement of 1827; for in the view which I take of the case, the settlement of 1815 rests as much in contract and equity as that of 1827. This is not a case in which valid remainders to collaterals are to be destroyed, or in which effect cannot be given to a subsequent contract for valuable consideration, without disturbing actually vested legal interests. I divest no estate; I decide between two contracts, and although that of 1815 was prior in point of time, yet the latter, that of 1827, being supported by a valuable consideration, which was wanting to the former, must prevail. I therefore decide in the Plaintiffs' favour as to these two denominations of *Ballyfadeen* and *Moymore*.

(a) Turn. & R. 281.

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A. being equitable tenant in tail of certain lands, some of which were fee-simple, and some held under leases *pur autre vie*, during the lifetime of his father, the prior tenant for life, and before he obtained the actual possession of said lands, sold a portion of the

leasehold interests, and by a contemporaneous deed conveyed the fee-simple lands to *chaser*, by way of indemnity against all incumbrances affecting the purchased lands the period of this transaction, was married to the Plaintiff; but no settlement had executed upon the occasion of the marriage. In 1808, upon the death of his, *A.*'s, father, the legal fee descended upon *A.* In 1810, by a further deed executed between *A.*, on the one part, and trustees, in whom the estate of the vendee in the sale of 1804, was on the other part, *A.* covenanted that in case the purchased lands should be made liable for the amount of the incumbrances affecting same, the trustees should be at liberty to the indemnity lands, to be recouped thereof in all such sums, with interest and costs. In 1813, *A.* and his wife, the Plaintiff, executed a deed, whereby, after reciting that they had agreed to levy a fine to discharge her right of dower, and that *A.* had agreed to her a jointure or rent-charge in lieu thereof, *A.* conveyed the said indemnity lands and the use of himself, his heirs, and assigns, discharged of all estates tail and right of dower, and by the said deed he charged the said lands with an annuity of 200*l.* per annum by way of jointure. *A.* having subsequently died, and the lands charged with the annuity having proved insufficient, in consequence of prior incumbrances, the bill in this cause was filed by the Plaintiff, praying that she might be declared entitled to dower in all the estates of which *A.* was seised during the coverture, except such as had been conveyed subsequently to the deed of 1813.

Held, that as against the parties deriving under the vendee in the sale of 1804, the Plaintiff's claim could not be sustained; but that as against the heir-at-law of *A.* she was entitled to a decree.

If a man, before marriage, enter into a contract for the sale of his fee-simple estate, and a subsequent marriage does not, in Equity, create any right of dower.

If a tenant in tail create an incumbrance, or convey his estate by a voidable conveyance, and afterwards levy a fine, though for a different purpose, the first operation only will be to give effect to the antecedent act.

The same rule has been extended to the case of an equitable charge.

A conveyance by lease and release does not operate by estoppel; *Right v. Bucknall* (2 Sim. & S. 519), overruling *Bensley v. Burdon* (2 Sim. & S. 519).

The Plaintiff is not entitled, as of course, to a decree against a party, as to whom she has been taken *pro confesso*. He is bound to make out his case, and establish the relief sought.

THIS was a bill by a widow, claiming dower out of the lands, of which her husband was seised.

By indenture, bearing date the 17th of February 1804, and made between *Francis Lloyd* and *George Lloyd*, his only son and heir-at-law of the said *George Lloyd*, first part, *Thomas Lloyd*, and Captain *Thomas Lloyd*, second part, *John Bateman* and *Rowland Bateman*, third part, and *Catherine Binden* and *Catherine Binden*, fourth part,

man, of the fourth part, being the articles executed on the occasion of the marriage of the said *George Lloyd* and *Catherine Bateman*, the said *Francis Lloyd* and *George Lloyd* covenanted, that in consideration of the said intended marriage, they would, immediately after the solemnization thereof, grant and convey unto the said *Thomas Lloyd* and *Thomas Lloyd*, the lands of Barraneige and Parkreagh, of which the said *Francis Lloyd* was seised in fee-simple, together with the lands of Curraghalownkard, Shagrove, *Money-mohill*, and *Limonea*, and a certain house and premises, together with a plot of ground, situate in the city of *Limerick*, of which said lands and premises the said *Francis Lloyd* was seised *quasi* in fee, by virtue of several leases for lives containing covenants for the perpetual renewal thereof; and also the lands of *Caharhavalla*, held by the said *Francis Lloyd*, under a lease for the term of three lives, to the uses and upon the trusts following, that is to say: to the intent that the said *Francis Lloyd* should take thereout an annuity, or yearly rent-charge, of 60*l.* per annum, during his life; and, subject thereto, to the use of *George Lloyd* for life; and after the decease of *George*, to the use of *John Bateman* and *Rowland Bateman*, for the term of five hundred years, upon trust to secure an annuity for the said *Catherine Bateman*, in case she should survive the said *George Lloyd*, and also portions for the younger children of the marriage; and subject thereto to the use of the first and other sons of the said marriage in tail male, with remainder to the use of the said *Francis Lloyd*, his heirs and assigns, for ever.

There was issue of this marriage several children, of whom the eldest was *Francis Lloyd*; but no settlement was ever executed by either *Francis Lloyd*, the grand-

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father, or *George Lloyd*, the father, pursuant to these articles.

In 1793 *Francis Lloyd* intermarried with *Mary Lloyd*, the Plaintiff in the present cause, but no settlement was executed upon that occasion.

In the year 1804, *Francis Lloyd*, during the life-time of his father, *George*, and before he obtained possession of any part of the lands comprised in the articles of February, 1770, entered into a contract with the Rev. *Thomas Lloyd* for the sale of a portion thereof; and by indenture bearing date the 15th of April, 1804, and made between the said *Francis Lloyd*, of the one part, and the said Rev. *Thomas Lloyd*, of the other part, he conveyed the dwelling-house and premises, together with the plot of ground, in the city of Limerick, unto the said *Thomas Lloyd*, his heirs and assigns, for ever; and by another indenture of even date, and made between the same parties, the said *Francis Lloyd* conveyed unto the said *Thomas Lloyd*, his heirs and assigns, the lands of Barraneige, Parkreagh, Curraghallowkard, Shagrove, and Moneymohill, for the purpose of indemnifying him, and the premises conveyed to him by the contemporaneous deed, from all charges and incumbrances created by the articles of February, 1770, against all judgment debts and recognizances, or other incumbrances affecting said lands, whether created by the said *Francis Lloyd*, or by his father, or grandfather, or by any person or persons whatsoever.

By another indenture, bearing date the 6th of May 1808, also executed in the life-time of the said *George Lloyd*, the father of said *Francis Lloyd*, and made between

the said *Francis Lloyd* of the first part, the said Rev. *Thomas Lloyd* of the second part, and *Robert Lloyd* of the third part, the said *Francis Lloyd*, for the considerations therein mentioned, conveyed unto the said *Richard Lloyd*, his heirs and assigns, the lands of Limonea, other portion of the lands comprised in the said articles of February, 1770, in trust for the said *Thomas Lloyd*, his heirs and assigns.

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George Lloyd, the father, departed this life some time in the month of August, 1808, without having in any manner disposed of by his will, which bore date the 11th of October, 1804, the legal estate in the lands and premises which were the subject of the articles of February, 1770; and thereupon the legal estate in said lands descended upon the said *Francis Lloyd*, as the heir-at-law of the said *George Lloyd*: and he, immediately upon the death of his father, being also entitled to the beneficial interest under the said articles, subject only to the covenants and agreements therein mentioned, entered into the possession of all the lands comprised in said articles, except such of them as had been previously conveyed, by the deeds of the 15th of April, 1804, and the 6th of May, 1808, to and for the use of the said *Thomas Lloyd*.

By indenture bearing date the 16th of November, 1810, and made between *Francis Lloyd* of the one part, and *Richard Lloyd* and *John Lloyd* of the other part, after reciting the deeds bearing date respectively the 15th of April, 1804, and the 6th of May, 1808, that the description of the premises thereby intended to be granted was inaccurate; that the said Rev. *Thomas Lloyd* was dead, having bequeathed all his estate and interest in said premises to three trustees, of whom the said *Richard Lloyd*

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and *John Lloyd* were the survivors, and that the said *Francis Lloyd* had been required to execute a more perfect conveyance of the said premises, the said deed witnessed that the said *Francis Lloyd* conveyed the said house and plot of ground in the city of Limerick, and also the town and lands of Limonea, unto the said *Richard Lloyd* and *John Lloyd*; and after further reciting the articles of the 17th of February, 1770, and that *Francis Lloyd* had agreed that all the lands and premises thereby granted should be fully exonerated from all charges created by the said article, or by the said *Francis Lloyd*, or his father, grandfather or by any person whatsoever; and that, for the purpose of indemnifying the said lands and premises so granted, he had agreed that all the other towns and lands comprised in the said articles should stand exclusively charged with such charges and incumbrances, the said deed witnessed that the said *Francis Lloyd* did then and for himself, his heirs, executors, and administrators, covenant(a) with the said *Richard Lloyd* and *John Lloyd*, that in case the rent charge created by the said articles of February, 1770, or any of the monies thereby charged for younger children, or any incumbrance affecting the lands and premises thereby granted, whether created by the said *Francis Lloyd*, or his father or grandfather, or any other person whatsoever should be raised or levied out of said lands, that the said *Richard Lloyd* and *John Lloyd*, their heirs and assigns should, either by receipt of the rents and profits of the lands of Barraneige, Parkreagh, Curraghalownkard, Shagrove, and Moneymohill, or by sale or mortgage of said lands, or a competent part thereof, raise and levy the sum

(a) This deed was stated in the bill to be an actual conveyance of the legal estate as an indemnity. See p. 375.

which should be so raised thereout, and the interest thereof, and all costs and expenses which the said *Richard Lloyd* and *John Lloyd*, their heirs and assigns, or their *cestui que trusts* should sustain, it being the true intent of the said deed that the said lands and premises thereby granted should be held freed and discharged from all charges and incumbrances whatsoever.

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By a further indenture, bearing date the 14th of January, 1813, and made between the said *Francis Lloyd* of the first part, *Mary Lloyd* (the Plaintiff) of the second part, *Edward Lloyd* and *George Lloyd* of the third part, and *John Douglass Johnston* and *Thomas Lloyd* of the fourth part, after reciting that the said *Francis Lloyd* was seised of an estate in tail in the lands of Barraneige and Knockfinisk, and of an estate *quasi* in tail in the lands of Curraghalownkard, Shagrove, and Moneymohill, and Cappantimore, and further reciting that the said *Mary Lloyd* was entitled to dower of the said lands of Barraneige and Knockfinisk, in the event of her surviving her husband; and that for the considerations therein mentioned, she had agreed to levy a fine in order to discharge same from her dower; and that *Francis Lloyd* had agreed to settle upon and secure to her a jointure of 200*l.* in lieu and bar of all dower or thirds to which she might be entitled; and further reciting that *Francis Lloyd* was desirous to make sale of the fee and inheritance of the said lands of Barraneige and Knockfinisk, and in order to make out a good title thereto, to have a recovery suffered of same lands of Barraneige and Knockfinisk, and also to vest the lands of Curraghalownkard, Shagrove, Moneymohill, and Cappantimore, in the said *Edward Lloyd* and *George Lloyd*, their heirs and assigns, to the intent that the said *Mary Lloyd* and her

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assigns might receive thereout an annuity or yearly charge of 200*l.* for her life, in case she should survive her husband the said deed witnessed that the said *Francis Lloyd* and *Mary*, his wife, granted and released the said lands of Baraneige and Knockfinisk unto the said *Edward Lloyd* and *George Lloyd*, their heirs and assigns, for ever, hold the same upon the trusts thereafter expressed concerning the same, that is to say, to the use of the said *Francis Lloyd*, his heirs and assigns, freed and discharged from all estates tail in possession, expectancy, and remainder, and the reversion and reversions expectant thereon, and also free, clear, and exonerated of and from dower and claim of dower, which the said *Mary Lloyd* was or might be entitled to out of said lands: and was thereby declared that the fine therein mentioned intended to be levied by the said *Mary Lloyd*, and recovery to be suffered by the said *Francis Lloyd*, should be deemed and taken to enure to the above uses. And the said deed further witnessed, that the said *Francis Lloyd* grant and release the said lands of Curraghallowns, Shagrove, Moneymohill, and Cappantimore unto the said *Edward Lloyd* and *George Lloyd*, to hold the same for lives of the several *cestui que vies* in the respective leases named, and for such other lives as should be thereafter added thereto, pursuant to the covenants in said leases respectively contained, to the uses therein declared concerning the same, that is to say, to the intent that all estates tail therein should be barred and extinguish and that the said *Edward Lloyd* and *George Lloyd* should hold the same to the use of the said *Francis Lloyd* for life; and from and after his decease, to the intent that the said *Mary Lloyd*, in case she should survive the said *Francis Lloyd*, should receive and take out of the said lands

mentioned lands an annuity or yearly rent-charge of 200*l.*, from the decease of the said *Francis Lloyd*, for and during the term of her natural life, as and for her jointure, and in lieu and satisfaction of her dower and thirds at common law, which she could or might have or derive of or out of all or any of the lands and premises whereof the said *Francis Lloyd* then was, or at any time or times thereafter during the coverture between them should be, seised of any estate of freehold or inheritance. The deed contained the usual clauses of distress and entry in case of non-payment of the annuity, and a covenant on the part of *Francis Lloyd* for the due payment thereof. The fine was shortly afterwards levied, in Hilary Term in the same year, and a recovery duly suffered.

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By indenture bearing date the 1st of January, 1817, and made between the said *Francis Lloyd* of the one part, and his son, *Francis Lloyd*, of the other part, the said *Francis Lloyd*, the elder, demised to his said son the said lands of Barraneige for the term of three lives, with covenant for the perpetual renewal thereof, at the yearly rent of 48*l.* 16*s.*

In the year 1829, *Francis Lloyd*, the elder, was discharged as an insolvent debtor, and *Samuel Harding* was appointed his assignee: and in the year 1834, the said *Francis Lloyd* died intestate, leaving *George Lloyd*, his eldest son and heir-at-law, and his widow, *Mary Lloyd*, the Plaintiff, him surviving.

In the year 1814, the Earl of *Egremont*, to whom the said *Francis Lloyd* had granted the lands of Barraneige and others, by deed of the 11th of August, 1811, to secure

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the sum of 2643*l.*, filed a bill at the Equity side of the Court of Exchequer to raise the amount of said mortgage and on the 19th of February, 1820, a decree was pronounced, whereby the mortgaged premises were directed to be sold, without prejudice, however, to the annuity of 200*l.* granted to the said *Mary Lloyd*, as hereinbefore stated, in case the said lands should prove sufficient to pay the Plaintiff in said cause, and the several creditors who had proved their claims under the decree to account in said cause; but in case the lands should prove deficient, then discharged of said annuity, and subject only to the said *Mary Lloyd*'s right of dower out of such parts of said lands and premises as were fee-simple. This decree was never prosecuted by the Plaintiff in that cause to a sale, the lands being altogether insufficient to pay the several creditors whose demands were prior to those of the Earl of *Egremont*, the Plaintiff in said suit.

The bill in the present cause was filed by *Mary Lloyd*, the widow of the said *Francis Lloyd*, on the 13th of September, 1841, and after setting forth fully the several deeds and circumstances hereinbefore stated, she stated that she became entitled to the annual sum of 200*l.* intended have been provided by the deed of the 14th of January 1813; but that, in consequence of prior charges and incumbrances, the annuity had wholly failed, by reason whereof she submitted that she was entitled to dower out of said lands of Barraneige, and all other lands of inheritance of which said *Francis Lloyd* was seised of the legatee in fee or fee tail at any time during his marriage; that of the lands comprised in the articles of February, 1771, some had been evicted for non-payment of rent, others sold; and that, in fact, the lands of Barraneige alone remained undisposed of.

The bill further charged that the lease of these lands of Barraneige, of the 1st of January, 1817, was antedated, and was not registered until the 22nd of September, 1840; that it was made at a gross undervalue and for the purpose of giving the said *Francis Lloyd*, the lessee therein, a beneficial interest as against the Plaintiff, and the creditors having liens on said lands; and that same was fraudulent and void, as against the Plaintiff, as to one-third of the lands therein comprised.

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The bill, after charging that by reason of said lease, the Plaintiff was wholly unable to proceed at law for the recovery of her dower out of said lands, prayed that the Plaintiff might be declared entitled to dower out of said lands of Barraneige, notwithstanding the execution of the deed of the 14th of January, 1813, and also out of all the other lands, whereof the said *Francis Lloyd* was seised of an estate of inheritance at any time during the coverture between him and the said Plaintiff, and which were not sold for valuable consideration subsequent to the execution of the deed of the 14th of January, 1813; that the lease of the 1st of January, 1817, might be declared void as against the Plaintiff, so far as related to one-third of the lands therein comprised; that an account might be taken of the said real estates, and that Plaintiff might be put into possession of the rents of the one-third part thereof in value, and that she might be declared entitled to hold same as and for her dower; and that, if necessary, a commission should issue for the purpose of assigning said third part, so that Plaintiff might enjoy same in severalty; that an account might be taken of the rents received since the death of *Francis Lloyd*, and that the several parties having claims under the articles of February, 1770, and having the secu-

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city of the other lands comprised therein, besides those of Barraneige, might be directed to stand as incumbrancers in the first instance upon the lands not subject to the Plaintiff's dower, in exoneration of the lands of which the said *Francis Lloyd* was seised, and that the said several estates might be marshalled for that purpose.

The Defendants, the Rev. *William Edward Lloyd*, the only surviving son of the Rev. *Thomas Lloyd*, the party entitled under the deeds of the 15th of April 1804, and the 1st of May, 1808, and *Anne* his wife, *Thomas Lloyd*, their eldest son, and the Rev. *Michael Lloyd Apjohn*, a surviving trustee, in whom all the estate and interest of the Rev. *Thomas Lloyd* had become vested under two deeds of the 20th of December, 1813, and the 29th of May, 1838, by their answer alleged that the lands so purchased by the Rev. *Thomas Lloyd* and then vested in them, had been considerably damnified, and still continued liable to be damnified, by means of incumbrances affecting same, and that they therefore ought not to be deprived of the benefit of said deed of indemnity, until they should be reimbursed the several sums already levied out of the purchased lands, and until said lands should be fully discharged from all incumbrances affecting same; that should the Plaintiff be decreed to be entitled to dower out of said lands of Barraneige, same would be altogether insufficient to meet the charges under the articles of February, 1770; that it was contrary to equity that the parties having such charges should stand as incumbrancers against the lands sold to the Rev. *Thomas Lloyd* in ease of the lands of Barraneige. And they further submitted whether the Plaintiff was now entitled to claim dower either out of the lands of Barraneige or any other lands, of which the said *Francis Lloyd*

was seized, inasmuch as the said Plaintiff had duly levied ~~fine~~ to discharge said lands of her right or claim of dower, and by the indenture of the 14th of January, 1813, had accepted a rent-charge or annuity of 200*l.* in lieu thereof.

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The bill was taken *pro confesso* against *George Lloyd*, the heir-at-law of *Francis Lloyd*.

The *Solicitor General*, Mr. Serjeant *Warren*, and Mr. *Rogers*, for the Plaintiff. *Argument.*

The Plaintiff's right to dower as against the heir-at-law of her husband, and all volunteers claiming under him, cannot be denied. In the first place, it is a case of jointure after marriage, where the widow always has her election; again the jointure provided has failed, in which event, even if made before marriage, the widow would be remitted to her dower, *Caruthers v. Caruthers*(a). The lease of the 1st of June, 1817, must be set aside, it is charged by the bill to be fraudulent and made at a gross undervalue, and for the purpose of defeating the claim of the Plaintiff. The Plaintiff's right and her equity are, in point of fact, admitted by the heir-at-law, inasmuch as he has allowed the bill to be taken as confessed against him. With respect to the Defendants, who have interests derived under *Thomas Lloyd*, the vendee in the sale of 1804, the case rests upon different grounds; still the right exists. When the legal fee-simple descended upon the Plaintiff's husband, the coverture existed, and no provision by way of jointure had been made for his widow; what, then, occurs to prevent the Plaintiff's legal right of dower from attaching upon the lands? The antecedent contract of

(a) 4 Bro. C. C. 500.

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indemnity, it will be said. But when that deed of 18 was executed, the husband had no estate in the lands wh he could convey; he had only a contingent interest, : the very instant he acquired the legal estate in the la the same moment the Plaintiff's inchoate right of do attached. The right to marshal, which also forms a pa the relief sought by the Plaintiff, appears to flow almos of course from the establishment of the right of dower, upon the ordinary principle, that where there are two fi and two classes of incumbrances, some of which are l upon both funds, and some only upon one, a Cour Equity will compel those incumbrancers, whose dema affect both funds, to resort first to that fund, which is subject to the claims of the second class of incumbran Here the dower can only be claimed out of the fee-sin lands, while the demands of the other incumbrancers, the charges under the articles of February, 1770, a equally the lands held for lives.

Mr. Moore, Mr. William Brooke, and Mr. W. Ll for the Defendants, William Edward Lloyd, and Ann wife, Thomas Lloyd, their eldest son, and the Rev. Mic Lloyd Appohn.

The Plaintiff in this case has not supported her c for dower as against the indemnity lands. When the Thomas Lloyd, the party under whom the Defendants whom we appear, purchased in 1804, Francis Lloyd, husband, was but equitable tenant in tail in remain At that time no right of dower existed in those lanc favour of his widow. It is true that, subsequently, legal fee descended upon him; but that did not entitle widow to dower. The descent of the legal estate cre no merger of the equitable tenancy in tail; Philip

Brydges(a). On this principle, in *Lyster v. Mahony*(b), which appears closely to resemble this case, your Lordship rejected the claim of dower. There a testator devised certain fee-simple estates to his nephew, upon trust to pay several annuities, and, amongst others, an annuity to his said nephew, his heirs and assigns, for ever. The widow of the nephew claimed to be entitled to dower out of this annuity; but your Lordship was of opinion that as the rent-charge was not an equitable interest, and that as the legal and equitable estates were not commensurate, the widow could not enforce her right of dower in the annuity. Here both parties, as well the Plaintiff as the purchaser, *Thomas Lloyd*, claim under the husband; and, therefore, the prior contract in favour of the husband, must bind the wife. In *Hinton v. Hinton*(c), where the question discussed related to the right of free bench, it was held that the widow of a copyholder, who had contracted for valuable consideration to sell, but had died before actual surrender, was bound to surrender her free bench in performance of her husband's agreement. *Brown v. Raindle*(d) supports the same principle. But there is another and an equally conclusive view of the case as against the Plaintiff: by the operation of the fine levied in 1813, following out the deed of the 14th of January, 1813, the Plaintiff is clearly barred. By that deed it is expressly stated that the Plaintiff had joined therein in order to discharge the lands of all claim of dower. The fine was duly levied in the following Term, in order to give full and legal effect to that deed. It is said that the lands charged with the jointure or rent-charge by that deed have proved insufficient; but

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Argument.

(a) 3 Ves. 120.

(c) 2 Ves. Sen. 631.

(b) *Ante*, vol. i. p. 236.

(d) 3 Ves. 256.

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Argument.

this circumstance, though it may give the Plaintiff a claim against any other lands of which her husband was seised, *Mansfield's Case*(a), *Treatise on Vendors*(b), can establish none against the indemnity lands, which were bound by the husband's contract prior to the attaching of any right of dower, and which contract was, in point of fact, set up and confirmed by the recovery levied in 1813, the effect of which was, to establish and support all the antecedent acts of the tenant in tail according to their priority. Again, how can it operate against the purchaser or those representing him, that by subsequent events, with which he had no connexion, the benefit intended for the wife by the deed of 1813 has failed? In the case of *In re Herons*(c), this Court held a widow barred of her claim of dower by a future contingent provision accepted by her upon the occasion of her marriage. In *Simpson v. Gutteridge*(d), where a rent-charge had been settled upon an adult female in lieu of dower, a purchaser from the husband of other lands than those charged with the rent-charge was held not entitled to look into the title of the husband to inquire, whether he had a good title to the lands out of which the rent-charge was granted.

THE LORD CHANCELLOR :—

In this case *Francis Lloyd*, the grandfather of the husband of the present Plaintiff, was seised of certain estates some in fee-simple, and some for lives renewable forever and by articles of the 17th of February, 1770, entered into upon the occasion of the marriage of his only son, *George Lloyd*, he agreed to settle the estates on his son for life, with

(a) Co. Litt. 33. a. (n. 8.)

(c) Flan. & K. 330.

(b) Vol. ii. p. 215, 9th ed.

(d) 1 Madd. 609.

remainder to trustees for a term of years, to secure a jointure for the intended wife and portions for the younger children of the marriage, and subject thereto to the use of the first and other sons of the marriage in tail, with the reversion to the settlor in fee. The eldest son of that marriage was the husband of the present Plaintiff, and on his birth he became equitable tenant in tail of the property. After the son attained his majority, and in the life-time of his father, he sold his interest in a portion of the leasehold property to the Rev. *Thomas Lloyd*. He also executed a conveyance of his fee-simple estates, by way of indemnity, in order to secure the purchaser against any charge created by the articles,—indeed, against incumbrances generally. The first question is, what interest had the party to convey at the time of the execution of this conveyance? He had, of course, no legal estate, the whole fee-simple being in his father, who was alive at the time; but he had a good equitable tenancy in tail, which he could convey, and his conveyance would, according to all the authorities, be good, though subject to be defeated by the entry of the issue, in case they wished to avoid it. The conveyance was not void, it was only voidable: the authorities are quite clear on this point. This conveyance being an innocent conveyance, by lease and release, could not operate by estoppel. It is true that Sir *John Leach*, in *Bensley v. Burdon*(a), did hold the contrary, and decided that an estoppel could be worked by lease and release. The point was subsequently ruled the other way in the Court of King's Bench, in *Right v. Bucknell*(b); and it is now clearly settled, that a conveyance of this nature has no effect upon the legal estate which the party subsequently acquires.

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(a) 2 Sim. & S. 519.

(b) 2 B. & Adol. 278.

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Judgment.

When the father died, the legal estate in fee, su the articles, descended upon the son, who thus legal tenant in fee, and equitable tenant in tail. gued, as an abstract proposition, that his wife dowable, because, according to the case of *Lysterhony(a)*, decided in this Court, the estates not be extensive or commensurate, the legal estate being extensive than the equitable, there could not be union of the two estates as to give validity to the claim to dower. But I am not of that opinion; for be a legal fee-simple upon which dower would attack and an equitable estate tail, the whole legal fee would be exhausted to the extent of the equitable tail, and as the estate tail, if legal, would be liable to I should be of opinion that in such a case the widow be entitled to dower, for this Court would not prevent from enforcing her right at law. But the question did the previous conveyance operate to defeat her dower? It is said that no direct authority is to be found upon the point; but I feel no doubt about it. If before marriage, enter into a contract for the sale of a fee-simple estate, his subsequent marriage would in Equity, be held to create any right of dower (I am speaking in reference to the old law), the husband as trustee for the purchaser, and the Court would not allow the wife to assert her right of dower. This opinion has always been entertained, and am now prepared to act judicially. The contract in this case, it is true, was made after the marriage, but it was a valid contract, because the legal estate vested in the husband. If A. conveyed an estate in remainder, not subject to dower at the time

(a) *Ante*, vol. i. p. 236.

conveyance, dower will not afterwards attach on that estate in favour of A.'s wife, merely because, if he had not conveyed the estate, it would have fallen into possession and become liable to dower. Here the equitable estate of the husband was bound by the conveyance before any right to dower attached upon it; and I am clearly of opinion, that when the husband subsequently became seised of the legal estate, out of which the equitable estate arose, he was bound by his previous conveyance, and that the wife was equally bound, and, therefore, she is not entitled to dower.

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Judgment.

The case, however, does not rest upon this alone. In 1810, after the death of the father, and after the legal fee-simple had descended upon the son, he conveyed the legal fee-simple in trust for the person, to whom he had conveyed the equitable estate; this conveyance was, no doubt, subsequent to the attaching of the wife's right of dower at law; but afterwards, in 1813, an informal instrument was executed, in which the wife herself joined, by which, after reciting that she was entitled to dower out of the lands comprised in that deed, and that she had agreed to levy a fine to discharge the same, the lands were relimited to the use of *Francis Lloyd*, the husband in fee, freed and discharged from the claim of dower. By the levying of the fine, the Plaintiff intended to bar her dower; the legal fee-simple was in the purchaser already; when therefore, the Plaintiff levied a fine, and the lands were relimited to the husband, I am of opinion, that the fine operated to discharge her right of dower against those lands, in the hands of the person to whom they had been previously conveyed by the husband, and that by force of the fine she barred any previous right to which she might have been entitled. She had nothing but her dower to part with; the husband's fine

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 v.
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 ———
Judgment.

would operate to give effect to his previous conveyance. It is perfectly settled that if a tenant in tail execute a conveyance, and afterwards levy a fine, the fine operates to give effect to his previous conveyance. Here the estate was conveyed by the husband; and his fine, with his wife's concurrence in order to bar her dower, has given effect to the previous conveyance.

The present claim, *quâcunque viâ*, appears to me to be wholly without foundation, as far as the Defendants, who claim under the person who obtained the conveyance, are concerned, and the bill must therefore be dismissed against them, with costs. As far as regards the heir, the bill having been taken *pro confesso* against him, the Plaintiff is entitled to the decree she has prayed for, though I cannot say that I am satisfied as to his liability.

June 7.

On the following day the LORD CHANCELLOR stated, that according to the present practice, he ought not to have given the Plaintiff a decree against the heir, without having had the case satisfactorily made out; and therefore, he should direct the cause to stand in the paper for a future day, in order that it might be argued for that purpose on the part of the Plaintiff(a).

June 10.

Mr. Serjeant Warren was heard on this day for the Plaintiff.

(a) See *Hayes v. Brierley*, ante, vol. iii. p. 274.

THE LORD CHANCELLOR :—

If the facts were as stated, the Plaintiff would be entitled to the relief sought, but I apprehend they are not so. The facts are these: the husband, being equitable tenant in tail, conveyed certain premises, by way of indemnity, to a purchaser; and becoming subsequently seised of the legal fee-simple, he actually conveyed, by deed of the 10th of November, 1810, the legal estate to trustees. The wife afterwards joined in a deed and covenant to levy a fine to the use of the husband, his heirs and assigns, discharged of dower, and by the same deed certain other estates were charged with a jointure of 200*l.* per annum for the wife; and there was a covenant in the deed that this jointure should be regularly paid. I was of opinion that the widow's right to dower could not prevail against the parties claiming under the deed of the 10th of November, 1810, and upon this ground that the husband had previously conveyed his equitable interest; and though, no doubt, the conveyance of the legal estate was subsequent to the attaching of the wife's right of dower, yet the fine subsequently levied by the husband and wife, and in which the latter joined in order to bar her dower, enured to the benefit of the person, to whom he had conveyed discharged of dower. When the cause was originally heard, a decree was taken as a matter of course, against the absent party, *George Lloyd*, the heir-at-law of the husband, who had allowed the bill to be taken as confessed against him; but it afterwards occurred to me, that that was wrong, and that here, there being now no decree *nisi* in the first instance, the Plaintiff was bound to make out her case and shew that she was entitled to the relief which she sought.

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v.

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Judgment.

I think that the Plaintiff has not established her case.

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LLOYD

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LLOYD.

Judgment.

If a man, who is tenant in tail, create an incumbrance, convey his estate by a voidable conveyance, and afterwards levy a fine, though for a different purpose, the first operation of the fine will be to give effect to the antecedent as well as the subsequent declaration; if it were a legal conveyance the fine would operate as a confirmation of it; and the same rule has been extended to the case of an equitable charge. On that ground, I held, that as against the parties claiming under the indemnity deed, the Plaintiff had no right to dower. Now, I do not see how the law is different as to the parties here; for though he does not claim as a purchaser, yet he does claim under the husband, and the object of the fine and deed was to vest the lands in him, discharged of dower. The question is now whether, in consequence of the eviction of her jointure lands, the widow is entitled to proceed against the estate, of which she was originally dowable, for I shall not meddle with the title. The case I have to deal with is that of a lady not entitled to dower, who has wholly barred her right to dower? She does not seek to be allowed dower out of estates subject to dower. But she having by the fine barred her dower out of the estate generally, now seeks to be relieved from the consequences of that fine, and to have her right to dower recreated. I doubt whether the Court has any jurisdiction to do so. Though she was a *feme covert* at the time the fine was levied, yet she had a contracting mind, and the law enabled her to give effect to her contracts through the medium of a fine. She was entitled, by law, to dispose of her right to dower, and to accept a substituted provision by jointure. This she has done, and, therefore, must abide by it, and I cannot give her relief, because it has turned out differently from what she expected. She is not without her remedy; her husband covenanted to pay the

jointure; she is therefore a specialty creditor under the deed, and may have relief as such; but this is a suit merely for dower, and she has failed to establish her title to it. The bill must, therefore, be dismissed with costs.

1843.
LLOYD
v.
LLOYD.
Judgment.

Mr. Serjeant *Warren* having applied to the Court to stay the decree until he should have again an opportunity of looking into the deeds, particularly the deed of the 10th of November, 1810, which, although so represented in the bill, he believed, did not amount to a conveyance,

THE LORD CHANCELLOR was pleased to comply with the application; and on a subsequent day the case was again spoken to, and it appearing that the deed of 1810 was merely a contract of indemnity, a decree was pronounced for the Plaintiff as against the heir-at-law.

June 17.

Refer it to the Master to inquire and report what freehold lands the said *Francis Lloyd* died seised of, whereof the said *Mary Lloyd* is dowable; and let the Master take an account of the rents and profits of said freehold lands, whereof the said *Francis Lloyd* died seised, accrued since the death of the said *Francis Lloyd*, and by whom received; and also an account of all charges and incumbrances affecting the said lands; and let the said Master report the priorities thereof respectively. Declare that the indenture of lease bearing date the 1st of January, 1817, in the pleadings mentioned, is fraudulent and void as against the said Plaintiff; and let the Plaintiff's bill be dismissed with costs as against the Defendants, the Rev. *William Edward Lloyd*,

Decree.

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v.

LLOYD.

Decree.

and *Anne*, his wife, *Thomas Lloyd*, and the Rev. *Lloyd Apjohn*. Reserve further directions and costs to the return of the Master's report.

Reg. Lib. 88, fol. 189,

M'DONNELL v. M'DONNELL.

June 5.

By articles executed upon the marriage of *A.* and *B.*, it was provided, that the survivor should, in case of issue, leave to said issue two-thirds of whatever property might remain, retaining one-third; or, to be more specific, that *A.* should settle upon any children he might have by *B.* two-thirds of the property he might possess, in case he survived her, and that *B.* should be equally bound to settle and hand over to any children she might have by *A.*, two-thirds of any property remaining at the time:—

Held, that she was entitled to one-third of all the property of which *A.* died possessed.

UPON the occasion of the marriage of *Michael M'Donnell* and *Margaret Prendergast*, the following articles were executed:

“As a marriage is about to be solemnized between *Michael M'Donnell* and *Margaret Prendergast*, the following preliminaries are by this deed fixed, viz.: That one or either of the parties survives the other, the survivor shall, in case of issue, leave to said issue, two-thirds of whatever property may remain, retaining one-third; or more specific, that *Michael M'Donnell* shall settle upon any children he may have by *Margaret Prendergast* two-thirds of the property he may possess, in case he survives her, and that she, *Margaret Prendergast*, shall be bound to settle and hand over to any children she may have by *Michael M'Donnell*, two-thirds of any property remaining at the time.”

This instrument was not dated; but shortly after the execution, the marriage was solemnized. There was only one son, *Patrick Joseph M'Donnell*, who survived his father. The Plaintiff, *Margaret*, survived her husband, *Michael M'Donnell*, and also her son, to whom she was his representative, and filed the present bill, claiming costs.

of the property in her own right, and the remaining two-thirds as the personal representative of her son.

1843.
M'DONNELL
v.
M'DONNELL.
Statement.

The Defendants were the executors and legatees of the husband, *Michael M'Donnell*.

Mr. Moore, Mr. Monahan, and Mr. M'Dermott, for the Plaintiff, submitted that the articles bound all the property, which remained at the death of her husband; and that the Plaintiff was consequently entitled to one-third in her own right, and to the residue as representing her son, who was the only child of the marriage. Argument.

Mr. Serjeant Warren, Mr. Armstrong, and Mr. Hughes, for the Defendants, contended, that, upon the true construction of the articles, it was intended that the survivor should only be entitled to one-third of his or her own property; that there was, therefore, no gift of the one-third of the husband's property to the widow, but that it passed under his will to the Defendants.

THE LORD CHANCELLOR :—

Judgment.

I think that this case is clear. By the first clause, the articles provide that the survivor should leave to the issue of the marriage two-thirds of the property, and retain one-third. It is said that, as the husband has died first, his property was not bound by the settlement, and that he might dispose of it in any manner he thought fit. It is plain, that whatever is to be done, it is the survivor that is to do it. The word "leave," which has been adopted, would, I think, if the articles had stopped there, confine the obligation to a disposition by will. It could hardly have been

1843.
 M'DONNELL
 v.
 M'DONNELL.
 Judgment.

the intention, that the father should, during his life-time, vest himself of his property in favour of his children. The clause, which follows, is introduced for the sake of explanation, "to be more specific, that *Michael M'Donnell* settle upon any children he may have by *Margaret Pendergast*, two-thirds of the property he may possess, in case he survives her;" this is still confined to the case of husband surviving. But then comes the clause as to wife: "and that she, *Margaret Pendergast*, shall be equally bound to settle and hand over,"—observe how different the phraseology is, she is not merely to settle, but actually to hand over,—"to any children she may have by *Michael M'Donnell*, two-thirds of any property remaining at the time." Now what property does this refer to? Manifestly to the same property mentioned in the former clause, which was altogether the property of the husband. The whole was bound by the articles. If the husband survived, he was to have settled two-thirds upon the children, and disposed of one-third as he pleased; and a similar disposition was contemplated in the event of the wife surviving. Such was evidently the intention of the parties, and this is one of the few cases, in which a very short form worked out its own purposes. I shall, therefore, declare the Plaintiff to be entitled to one-third of the property which her husband died possessed, in her own right, and to the remaining two-thirds as personal representative of her son.

Decree. Declare that, according to the true construction of articles of agreement, entered into previous to the marriage of the Plaintiff with *Michael M'Donnell*, deceased, the Plaintiff is entitled to one-third of the property, of which

Michael M'Donnell died possessed; and that *Pa-
seph M'Donnell*, her son, was entitled to the other
ds thereof, and that she, as the personal representa-
er said son, is now entitled to those two-thirds.

Reg. Lib. 88, fol. 90, 1843.

1843.

M'DONNELL
v.
M'DONNELL.
Decree.

JOHNSTON v. KIRKWOOD.

1843.

JOHNSTON, the Plaintiff in this cause, was a
ert, but had been deserted by her husband, *George*
n, who had left the country several years since.
been supported by her brother, *Thomas Kirk-*
p to the period of his death; and he, by his will, be-
d to her an annuity of 20*l.* per annum, and a legacy

The annuity had been regularly paid, but the
nt, *William Kirkwood*, who was the executor of
ator, having heard that the husband was still alive,
dent in America, refused to pay the legacy; where-
e present bill was filed by the Plaintiff, as a *feme*
compel payment of the legacy of 100*l.*, and also
rrears of the annuity.

ie part of the Defendant evidence was gone into, to
at the husband was still alive; while on the part
laintiff it was insisted, that, as nothing had been
f him for more than twelve years, he must be pre-
be dead.

Moore and Mr. *Walter Bourke* for the Plaintiff.

Monahan and Sir *Colman O'Loghlen*, for the De-
submitted to act as the Court should direct.

June 7.
The Plaintiff,
who was a mar-
ried woman,
but had been
deserted by her
husband, when
he left the coun-
try, several
years since,
filed a bill as a
feme sole to en-
force payment
of a legacy be-
queathed to her
subsequently to
the abandon-
ment. There
having been
some evidence
in the cause to
shew that the
husband was
still alive, the
Court, at the
hearing, gave
liberty to the
Plaintiff to
amend the bill
by adding a
next friend, and
making her
husband a De-
fendant, and
charging him
to be out of the
jurisdiction,
and to have
abandoned his
wife.

1843.

JOHNSTON
v.
KIRKWOOD.
—
Judgment.

THE LORD CHANCELLOR said, he would give the Plaintiff liberty to amend her bill, by adding a next friend, and making her husband a party Defendant, charging him to be out of the jurisdiction, and that he had abandoned his wife : and subsequently His Lordship made a decree in favour of the Plaintiff, declaring her entitled to the arrears of the annuity, and ordering the legacy to be paid into Court to the credit of the cause ; the costs of the Defendant to come out of said legacy, and the interest and dividends accruing on the residue to be paid to the Plaintiff, with liberty to all parties to apply as there might be occasion.

Reg. Lib. 88, fol. 213, 1843.

1843.

ALLOWAY v. ALLOWAY.

June 16.

A testator, by his will, charged his estates with 6000*l.*, and directed "same to be paid to and among such of my younger children, as shall survive my said wife, in such shares and proportions, and at such times after her death,

WILLIAM JOHNSON ALLOWAY, by his will, which bore date the 23rd of July, 1829, after certain provisions for *Arthur Alloway*, one of his younger children, devised as follows: "and in order to provide for my other younger children, I hereby direct, that after the death of my wife, *Margaret Alloway*, or before, if the executor consider it more fit or necessary, the sum of 6000*l.* be raised by sale or mortgage of my said freehold estates as she shall direct by her will or deed." His wife, by her will, directed as follows: "*Robert* (the inheritor) give 3 of the 6000*l.* I wish to have given, to the two elder girls:—" *Held* also, that the remaining 3000*l.* went equally among all the objects of the power settling the fund to and amongst the children in any way she thought proper, and if she intended to create a joint tenancy she had power to do so.

Where there is a power to appoint to and amongst children, though there is no appointment, nor any gift in default of appointment, yet, by an implication arising from the terms of power, there is a gift to the children living at the death of the donor, as tenants in common.

Ballyshanduff and Ballycarroll, or either of them, and I hereby charge my said freehold estates with the payment thereof, and direct that same may be raised thereout in manner aforesaid, and that same be paid to and among such of my younger children, except my son *Arthur*, as shall survive my said wife, in such shares and proportions, and at such times after her death, as she shall direct by her will or deed (duly executed, appoint(a)) : and if any of my younger children shall marry in the life-time of my wife, and with her consent, then the proportions of such younger child to be paid according to the provision contained in an article or settlement executed previous to such marriage : and, subject to such charge, to be raised in manner and for the purposes aforesaid, I leave, bequeath, and devise all my estates and interest in said lands of Ballycarroll and Ballyshanduff to my eldest son, *Robert Alloway*, his heirs and assigns, for ever."

1843.
 ALLOWAY
 v.
 ALLOWAY.
 Statement.

The testator died in the month of October following, leaving his wife, *Margaret Alloway*, him surviving, and also six younger children, viz., *Margaret Anne Alloway*, *Anne Alloway*, *Arthur Alloway*, *George Holmes Alloway*, *Maria Alloway*, and *John Parker Alloway*.

In the year 1834, *Margaret Alloway*, the widow of the testator, made her last will, which did not bear any date, and was incorrectly spelt in every part. It commenced with the following paragraph, "*Robbert* give 3 of the 6 thousand pounds I wish to have given to the two elder girrels. I leave the girrels in gardenship of their aunt."

The will did not contain any other allusion to the charge of 6000*l.*, or any reference to the power of appointment. It

(a) *Sic.*

1843.

ALLOWAY

v.

ALLOWAY.

Statement.

was stated to have been dictated by the testatrix, during the illness of which she subsequently died, to her maid-servant, *Teresa Jones*, who committed the same to paper.

The testatrix died on the 18th of April, 1834, a few days after having signed the above will; at which period *Margaret Anne Alloway*, and *Anne Alloway*, the Plaintiff in the present cause, were the two elder daughters, and they, upon the death of their mother, entered into the receipt of the interest of the sum of 3000*l.*, each receiving the interest of the sum of 1500*l.*

On the 16th of April, 1835, *Margaret Anne Alloway* died intestate and unmarried, and without having done any act to affect her interest in the 3000*l.* so appointed by the testatrix.

Anne Alloway, the other elder daughter, upon the death of her sister *Margaret*, claimed the whole 3000*l.* by survivorship, as well as her proportion of the unappointed residue of 3000*l.*; and differences of opinion having arisen as to the interests of the younger children, the present suit was instituted by *Anne*, for the purpose of having the rights of the several parties interested in said sum of 6000*l.* ascertained and declared.

The questions argued were: first, whether the power warranted an appointment in joint tenancy; secondly, whether the appointment created a joint tenancy; and, thirdly, whether the two elder daughters were entitled to any portion of the remaining 3000*l.*

Mr. Serjeant *Warren*, Mr. *Monahan*, and Mr. *Morgan*,
for the Plaintiff.

1843.

ALLOWAY

v.
ALLOWAY.

Argument.

The effect of the two wills was to create a joint tenancy in the two appointees. It was competent to the donee of the power to have appointed this sum of 3000*l.* to the two elder daughters, as joint tenants, if she thought proper to do so, *Alexander v. Alexander*(a). In that case Sir *Thomas Clarke* says, "considering the nature of the power, the wife was confined as to the objects to give it to, but left to her discretion as to apportioning it among them. She might give an interest for life in a particular share to one child, or limit the capital of the same share to another, or even go so far as to limit it to a third child upon a contingency." It is therefore plain, that in this case the donor might have appointed 1500*l.* to one daughter and 1500*l.* to the other daughter, with a gift of the entire to the survivor, on the contingency of survivorship. When once, therefore, it is established, that the donee of the power had authority to create a joint tenancy, there can be no doubt that the words which she has used can have no other effect. There are no words of severance to be found in the will of the appointor, or any phrase indicating an inclination that the two elder girls should have several or distinct interests. If the testatrix had been the owner of this 3000*l.*, it is clear that the words used would have created a joint tenancy, *Campbell v. Campbell*(b); and it is quite settled, that the words of a will made in execution of a power are to receive the like construction, which the same words would have in an ordinary will, unless there be a contrary intent apparent on the face of the will, *Southby v. Stonehouse*(c). With

(a) 2 Ves. Sen. 640.

(c) 2 Ves. Sen. 610.

(b) 4 Bro. C. C. 15.

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v.

ALLOWAY.

Argument.

regard to the unappointed residue of 3000*l.* it is divisible among the objects of the power in equal shares, as tenants in common; the next of kin of *Margaret* taking her one-fifth in equal proportions.

Mr. Moore, Mr. William Brooke, Mr. Longfield, and Mr. L. Bland, for Robert Alloway, the inheritor, and also one of the next of kin of Margaret Alloway.

The Solicitor-General and Mr. Johnston for others of the next of kin.

The will of the testator, *William Johnson Alloway*, did not authorize an appointment in joint tenancy. The donee of the power was not invested with any authority to regulate the estate to be bestowed; she had simply a power of selection among certain objects, a power to allot the shares which those objects were to take, and to appoint the times at which those shares were to be taken. In *Re v. The Marquis of Stafford*(a), where the power of appointment was "to the use of the lawful issue of the body, &c., in such parts, shares, and proportions, manner, and form," Lord *Ellenborough* seemed to intimate, that but for the words "manner and form," the power only authorized an appointment in tail: and this view is supported by the argument of Mr. *Mitford* in *Stratton v. Best*(b), and the case put by Mr. *Fearne*, in his *Treatise on Contingent Remainders*(c); *Peters v. Morehead*(d). If there had not been any appointment, the children would have taken, as tenants in common, in equal shares. This is settled by the case of *Casterton v. Sutherland*(e). The intention of

(a) 7 East, 521.

(b) 2 Bro. C. C. 233, 235.

(c) Page 230.

(d) Fortesc. 339; Fitzg. 156.

(e) 9 Ves. 445.

a donor, therefore, being clearly manifested to be in
 four of a tenancy in common, it would be strange to
 suppose that he could have ever intended that the donee
 could have power to create a joint tenancy. But, assuming
 at the power did warrant the creation of a joint tenancy,
 a question then arises, has the donee framed her will in
 such terms as to confer a joint tenancy in this sum of 3000*l*.
 upon the two elder girls? Now, it is to be remembered,
 that the leaning of the Court is always in favour of
 tenancy in common, *Taggart v. Taggart(a)*, *Spry v.*
Tomfield(b). The cases shew an anxiety on the part of
 the Judges to give effect to the slightest expressions afford-
 ing an argument in favour of a tenancy in common. Here
 is plain that the object, which the parties had in view,
 was to make a provision for children; but such a provision
 altogether inconsistent with the idea of a joint tenancy,
 inasmuch as no use can be made of the portions for the ad-
 vancement of the children during their minorities. It ap-
 pears to be very clear, that no intention of creating a
 joint tenancy ever existed in the mind of the testatrix. She
 does not fully exercise her power; she names no fixed
 ages at which the appointees are to take; she is silent as
 to most of the objects of the power; and there is no reason-
 able ground for inferring, that she had any further object
 than to fix the proportions of the two elder girls, without
 in any way interfering with the nature or quantity of the
 parts of the children. If this be so, the Court will not
 divest that right, which the children had prior to the
 execution of this lady's will. The suit has been most expen-
 sively conducted with regard to costs.

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Argument.

(a) 1 Sch. & L. 84.

(b) 7 Mees. & W. 545; 10 Sim. 94.

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Argument.

Mr. Christian, for *Maria Alloway* and *George Ho Alloway*, two of the younger children, submitted the children, in whose favour no appointment had made, were entitled to the whole of the unappointed residue. The testatrix intended the two elder children only to 3000*l.*; she never could have meant that they were to have any part of the remaining 3000*l.* The point was so ruled in *Fortescue v. Gregor(a)*, and appears to have been the first impression of Lord Alvanley, in *Wilson v. Piggott*

Mr. Monahan in reply.

Judgment.

THE LORD CHANCELLOR:—

In this case the testator, by his will, charged his estate with a sum of 6000*l.*, and he directed that it should “be paid to and among such of my younger children, except *Arthur*, as shall survive my said wife, in such shares and proportions, and at such times after her death, as she shall direct, by will or deed duly executed.” Now, the first question is, what is the meaning of this power given to the testator’s wife? Nothing can be better settled than that a gift to and amongst a class of persons will create a tenancy in common; and *Casterton v. Sutherland(c)* shews that where there is a power to appoint to and amongst children though there is no appointment made, nor any gift in default of appointment, yet, by an implication arising from the terms of the power, there is a gift to the children living at the death of the donor of the power as tenants in common. What, then, is the construction of the power as to reference to the interests, which the donee may confer

(a) 5 Ves. 553.

(c) 9 Ves. 445.

(b) 2 Ves. 351, 355.

exercising the power? The gift in default of appointment, and, therefore, until appointment, is in terms to the children as tenants in common; and the testator probably intended that the donee of the power should make a similar disposition; but still the wife clearly had the power of settling the fund to and amongst the children, in any way she thought proper.

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The case of *Alexander v. Alexander*(a) has established, that although, in the case of words like the present, where the property is personal estate, the donee may not appoint to any but the children, the objects of the power, and cannot exclude any, or give a mere reversionary interest to any child, yet within these limits the donee may appoint in any manner he thinks proper. For example, he may give to one child a share for his own life, or for the life of another person, with remainder over to the other children, and he may cross the gifts from one to another, provided only he give to each a real substantial share in possession, and not a mere nominal or reversionary interest. I am now speaking of the state of the law, as it stood before the late Statute(b).

It was contended at the bar, that this was a mere power of selection, and several well-known cases were referred to in support of the position. In *Peters v. Morehead*(c), all that was decided was this, that where the instrument creating the power limited the quantity of the interest to be appointed, the donee had only a power to select the particular lands, in which that interest was to take effect. In some of the other cases, and particularly in *Rex v. The Marquis of Stafford*(d), the Court felt difficulties on the

(a) 2 Ves. Sen. 640.

(b) 1 Will. IV. c. 46.

(c) Fortesc. 339; Fitzg. 156.

(d) 7 East, 521.

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point, whether a fee could be appointed, where the power only extended to issue, the expression "issue" seeming to point at descendants of the bodies, and therefore not to authorize an appointment in fee-simple. The Court, however, avoided the difficulty, and held that a fee might be given, inasmuch as the words "manner and form" followed the words "in such parts, shares, and proportions." *Phelp v. Hay*(a) was a case of the same class, the question being as to the extent of the interest which might be appointed under the power. A similar question came before me in *Crozier v. Crozier*(b), a case of much difficulty and importance. In *Liefe v. Saltingstone*(c), the words "manner and form" did not occur, yet the Court does not seem to have experienced the difficulty felt by the Court of King's Bench in *Rex v. The Marquis of Stafford*, and held that the power authorized the appointment of a fee. I do not mean to decide anything upon this point, but I may observe that my own opinion is, that where the power is created in general terms, and there is nothing upon the face of the instrument to control those terms, the Court ought to construe the power, as enabling the donee to appoint a fee-simple estate, and that it ought not to require the expressions "manner and form," or "shares and proportions," for the purpose of spelling out the intention of the donor, but should adopt the plain rule, that where the general scope of the power is not inconsistent with such a construction, the donee may appoint the absolute interest, whether in cases of real or personal estate. Where the subject is personal estate, as in the present instance, there can be no difficulty. Here there is not the slightest pretence for saying that the mother had a mere power of selec-

(a) *Treatise of Powers*, vol. ii. App. 16.

(b) *Ante*, vol. iii. p. 353.

(c) *Freeman*, 149, 176; 1 Mod. 189.

on. It wants no authority to prove that a power to a parent to dispose of personal estate in such shares and proportions as she shall think proper, is something more than mere power of selection. If in this case the mother intended to create a joint tenancy, she had power to do so. She had power to give a separate share to each daughter for her life, with remainder, as to the whole, to the survivor. Under a joint tenancy the effect would be the same, if not disturbed, although each daughter might make herself absolute mistress of her own share by severing the joint tenancy. I cannot say that this would not have been a valid disposition. However, it would not be a natural construction that she should mean to give a joint tenancy. The object was to provide for all the children. This is clearly shewn by the particular provision for settling the shares of the children upon their marriage. The fair construction would give to each daughter a separate interest in her own share unless a different intention appeared on the face of the gift.

What, then, are its terms? When she was on her death-bed, unable to write, she dictated to her illiterate maid-servant, who could not even spell correctly, this extraordinary document, which commences with this sentence, "Robert, give 3 of the 6 thousand pounds I wish to have given to the two elder girls." Does this, then, create a joint tenancy, or not? If I say, "I give to my two elder girls three thousand pounds," this is, no doubt, a joint tenancy. But the gift here is not in any such terms. The words are, "Robert, give,"—words rather of direction than gift, as if she had said, "Deliver over." How, then, would such a delivery or payment be made? It would not be paid in a Bank-note, which they would carry away as joint

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tenants; each would take her own separate portion. In default of any appointment the daughters would have taken their shares as tenants in common; and my opinion is, that the mother meant only to increase their shares, and to give the increased shares in the manner in which they would have taken in default of appointment: my decision, consequently, must be, that they took the 3000*l.* as tenants in common. There is much difficulty in the case, and it is very possible that if another Judge were sitting in this place, he might arrive at a different conclusion; but still, in the absence of a clear intention to create a joint tenancy, I think I have adopted the true construction, and that which effectuates the intention.

The question then remains to be considered, what is to become of the remaining 3000*l.*? No point can be better settled than this, that any portion of the fund or estate, which is not well appointed, goes in the same way as if there had been no appointment. Probably there is no case in which the parent, the donee of the power, meant that the appointee of a share of a fund should be entitled to any part of the unappointed residue, and accordingly, when instruments are carefully prepared, the conveyancer always guards against the operation of the rule of law upon the unappointed fund by the introduction of a hotchpot clause. The only case in which it was attempted to make an exception to the rule is *Wilson v. Piggott*(a), before Lord *Alvanley*. There several portions of the fund had been appointed by different instruments, and the sum appointed to one of the children was expressed to be, "her share of the portion provided for younger children," under the

(a) 2 Ves. 351.

settlement, by which the power was created. Lord *Alvanley* tried to hold that the appointment operated as a satisfaction of their claims under the original settlement, but he found the rule of law too strong for him, and, notwithstanding his inclination to the contrary, he was compelled to let in all the children upon the unappointed portion of the fund. *Fortescue v. Gregor(a)* has quite a different application. The circumstances were of this nature: a person had a power of appointment in favour of three children over a fund in Court. A petition was presented that a third of the fund should be transferred to one of the children, and the order was accordingly made, the petition reciting that the donee of the power was desirous that the fund should be equally divided between the three children. The Court subsequently held this a good appointment of the whole fund, for although it was difficult, as Lord *Loughborough* observed, to consider a mere recital in a petition an appointment, yet it was sufficient to indicate the clear intention of the party that the other two children should take the residue of the fund, and this was the ground of that decision. So in this case, if there appeared to be such an intention expressed or implied at the execution of the power, I would decide in the same way. It was said, that I must read the clause as a gift of the 6000*l.* in the first instance, and then a gift of 3000*l.*, part of the 6000*l.*, to the two elder daughters; but this is only a fanciful construction of the language of the will, while its sense is plain, meaning only, “I wish you, *Robert*, the person on whose property this money is charged, after my death, to give 3000*l.* to my elder daughters.” The authorities rule this case, and I, therefore, decide that the testatrix has

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the said *John Carter Barrett* and *James Cuthbertson*, in the penal sum of 2000*l.*, upon the trusts therein expressed, did deed witnessed, that it was thereby declared and agreed, that the aforesaid bond was executed to the said trustees upon the trusts following; that is to say, that in case the said *Julia Batt* should happen to survive her said husband, the said *John Carter Barrett* and *James Cuthbertson*, or the survivor of them, &c., should raise and levy the principal sum of 1000*l.* together with the interest thereon, the rate of six per cent. per annum, from the day of the death of the said *Benjamin Whiston Batt*, and pay over the same to the said *Julia Batt*, to be by her disposed of as she might think proper; and upon further trust, that in case the said *Benjamin Whiston Batt* should in his life-time pay the said principal sum of 1000*l.* to the said *John Carter Barrett* and *James Cuthbertson*, or the survivor, &c., that the said trustees should thereupon lay out and invest the said principal sum of 1000*l.* in good and sufficient security, with the consent of the said *Benjamin Whiston Batt* or *Julia Batt*, and pay the interest thereof to the said *Benjamin Whiston Batt* during his life, and from and after his decease should pay the said principal sum, and all interest due thereon, to the said *Julia Batt*, for her sole and separate use.

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Benjamin Whiston Batt shortly afterwards paid to the said *John Carter Barrett* and *James Cuthbertson* the principal sum of 1000*l.*, which was thereupon invested by them in the Government Three and a Half per cents.

The bill in the present cause was subsequently filed by *Benjamin Whiston Batt* and *Julia*, his wife, against the surviving trustee, *James Cuthbertson* (*John Carter Bar-*

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rett having some time before died), stating that they w
 in circumstances of the greatest poverty, and in wan
 the common necessities of life; that they had both reac
 an advanced period of life, being each bordering on si
 years of age; that there never was any issue of said m
 riage, nor had they any friend to whom they could ap
 for relief; and they sought to have the principal sur
 1000*l.* paid over to the husband for the supply of their
 mediate wants; the Plaintiff, *Julia Batt*, offering to w
 her equity, and to permit the trustee to be discharged f
 the trusts of the deed.

The Defendant, *Cuthbertson*, the trustee, by his ans
 submitted to act under the direction of the Court.

The cause was heard on the 13th of May, 1840(*a*), w
 a decree was pronounced, directing that the Plaintiffs'
 so far as it sought that the trust fund should be tr
 ferred and paid over to the Plaintiff, *Benjamin Whi*
Batt, should be dismissed with costs; and the de
 further directed, that the trustee should transfer to
 credit of the cause the sum of 814*l.* 19*s.* 6*d.*, Govern
 'Three and a Half per cent. stock; and the trustee
 ordered to be paid his costs out of the said trust fund.

On the 26th of May, 1843, the Plaintiff present
 petition of rehearing, stating this decree of dismissal;
 the costs of the Defendant, *James Cuthbertson*, had
 paid; and that there remained a balance of 733*l.* 2*s.*
 Three and a Half per cent. stock, standing to the cre
 said cause; that the decree was erroneous in having

(*a*) 2 Ir. Eq. R. 200.

missed the Plaintiffs' bill, so far as it sought a transfer of said fund, inasmuch as same was settled to the sole and separate use of the said *Julia Batt*, without any clause against anticipation; by reason whereof, and inasmuch as the Plaintiffs were fully competent to release the Defendant, *James Cuthbertson*, from the trusts of the settlement, said fund ought to have been disposed of according to Plaintiffs' desire. The petition accordingly prayed that the cause might be set down for a rehearing; and that the said fund might be ordered to be transferred to the Plaintiffs, upon their executing a proper release to the Defendant, *James Cuthbertson*.

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Mr. Serjeant *Keatinge* and Mr. *Gayer* for the Plaintiffs.

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When this cause was formerly heard, the attention of the Court does not appear to have been called to the fact, that the principal sum is settled, after the death of the husband, to the sole and separate use of the wife. It would seem to be clear, that where property is settled to the separate use of a *feme covert*, and there is no clause in restraint of anticipation, such property, even though it be reversionary, may yet be conveyed and disposed of by her in such manner as she may think proper. *Sturgis v. Corp(a)* is an express authority upon the point. Sir *William Grant* there states, "that where property is settled to the separate use of a married woman, she is as to the property a *feme sole*, and has a disposing power as such. She has as much a disposing power over her reversionary interest as over her interest in possession." *Keene v. Johnston(b)*, before the Court of Exchequer in this

(a) 3 Ves. 190.

(b) Jones & C. 255.

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country, appears to be almost exactly in point ; in this last case it was held, that a *feme covert*, to whose sole and separate use a reversionary interest in personal property was given, had just the same powers of disposition over that property, which she would have had were she a *feme sole* ; and that her assignment, during the life of her husband, would effectually bind her in case she survived. Neither of those cases were cited on the former hearing.

Mr. *Sheil* for the trustee.

Judgment.

THE LORD CHANCELLOR :—

No doubt, if this property were limited to the separate use of the lady she might dispose of it, and her power might be executed, although the property is reversionary ; but where a provision is made for a wife, to take effect after the death of her husband, in case she survive him, he cannot affect it during the coverture. This was settled by *Richards v. Chambers*(a). The difficulty of the present case consists in this : upon the first part of the deed she has no interest except in the event of her surviving her husband, which, consequently, he never could affect. The words are, “in case the said *Julia Batt* shall survive her husband, the said *Benjamin Batt*, the said *John Carter Barrett* and *James Cuthbertson* shall raise the sum of 1000*l.*, together with the interest thereon, from the day of the death of the said *Benjamin Batt*, and pay over the same to the said *Julia Batt*, to be by her disposed of as she may think proper.” Here is no limitation to her separate use ; the property would become her's absolutely,

(a) 10 Ves. 580.

but only upon a contingency ; and therefore the Court could not, upon her consent, order a transfer to be made.

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But then comes the other contingency: “and upon trust, that in case the said *Benjamin Whiston Batt* shall in his life-time pay the said sum of 1000*l.* to the said *John Carter Barrett* and *James Cuthbertson*, then the trustees shall thereupon invest the same in sufficient security (with the consent of the said *Benjamin Whiston Batt* or *Julia Batt*), and pay the interest thereof to the said *Benjamin Whiston Batt* during his life ; and after his decease pay the said principal sum and the interest due thereon to the said *Julia Batt*, for her sole and separate use.” Now this may mean nothing more than is expressed in the former part of the settlement, except as regards the separate use. The husband may say, I never meant her to have the money absolutely, merely because I paid it to the trustees. I have, however, to consider, whether upon the whole instrument the wife took more than a contingent interest. The first provision is clearly contingent ; and although I am disposed to think, that, under the second part, the wife did take a different interest, yet it may be held to depend upon the contingency of her surviving her husband, for the money is only to be raised by the trustees in that event. Although all parties now concur in desiring that the wife should be at liberty to dispose of this property, they may hereafter become adverse. I am therefore unwilling to make the decree sought for, which would enable the wife to dispose of the provision made for her in bar of dower, and in consideration of her fortune. The case appears to me to fall within *Richards v. Chambers*. It does not touch the question I had lately to consider in *Box v. Box*. I shall not disturb the decree, and the petition must be dismissed.

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June 16.
In the year 1818 *A.* entered into a contract with *B.* for the purchase of four denominations, and made an advance of 2000*l.* on account of the purchase-money. The treaty having been broken off, *A.* became an incumbrancer to the extent of the advance. In 1819, upon the occasion of the marriage of *B.*, by indenture of settlement, the four denominations were conveyed to trustees: as to two of them, to the uses of the marriage, in strict settlement; and as to the remaining two, upon trust to sell, whenever the settlor should require the trustees so to do, and apply the produce in payment of the several incumbrances enumerated in the schedule of the deed. *A.* was the third incumbrancer mentioned in the schedule, but neither he nor any of the other incumbrancers was a party to the deed. There never was any sale pursuant to the trusts of the deed:—

Held, that neither *A.* nor his representative, the Plaintiff in the second cause, was to be regarded as a *cestui que trust* under the deed of 1819, so as to be entitled to insist adversely on the execution of the trusts.

Interest on *A.*'s incumbrance to be computed from the period of six years prior to the filing of the bill.

Quære, whether the 25th section of the 3 & 4 Will. IV. c. 27, was intended to apply to the 40th and 42nd sections of the same Statute.

IN the year 1815, *George Putland* entered into a treaty with *John Bagwell*, the elder, and *John Bagwell*, the younger (the principal Defendant in this suit), for the purchase of the lands of Lisronagh, Shanbally, Carrigavilla, and Kilmore, for the sum of 40,000*l.*; and accordingly, by articles bearing date the 28th of October, 1815, reciting said contract, that 2000*l.* was then paid to the said *John Bagwell*, the elder, and *John Bagwell*, the younger, it was declared, that in case a good marketable title should not be made out to the said lands, the said agreement should be void; and that the said *George Putland* should have a charge or lien upon all and singular the said lands and premises for the said sum of “2000*l.*, and should, to all intents and purposes, be considered as a mortgagee thereof, for securing said sum.”

At the time of the execution of these articles the lands stood limited by a deed of the 14th of June, 1825, to such uses as *John Bagwell*, the elder, and *John Bagwell*, the younger, should jointly appoint; and in default of appointment, to *John Bagwell*, the elder, for life, with remainder to *John Bagwell*, the younger, in fee.

in the month of December, 1825, *John Bagwell*, the elder, died, whereupon, under the limitations of the said deed of the 14th of June, 1815, *John Bagwell*, the younger, became entitled to an estate in fee in the said lands. After the death of *John Bagwell*, the elder, the contract of purchase was rescinded by mutual consent, and it was agreed that the said sum of 2000*l.* should remain a charge upon the said lands.

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A deed of indenture of the 28th of July, 1819, and made between the said *John Bagwell* of the first part, *Nathaniel Taylor*, and *Elizabeth Taylor*, his sister, of the second part, *William Bagwell*, *Hamilton Bagwell*, of the third part, and *Matthew Jacob* and *Richard Moore*, of the fourth part; reciting that a marriage was intended to be solemnized between the said *John Bagwell* and *Anne Taylor*; and that *John Bagwell* stood seized to him and his heirs of an estate of inheritance in fee simple, of and in the several lands and premises therein conveyed, "subject to the several debts, charges, and incumbrances mentioned and specified in the schedule therebeforeon endorsed," said deed witnessed that the said *John Bagwell* conveyed the said lands and premises to the said *William Bagwell* and *Hamilton Bagwell*, upon the trusts following; that is to say, as to *Lisronagh* and *Shanry*, to the use of the said *John Bagwell* for life, with power under to trustees to preserve contingent remainders, and remainder to the said *Matthew Jacob* and *Richard Moore*, for a term of five hundred years, to secure a jointure of 600*l.* per annum for the said *Anne Taylor*, and provisions for the younger children of the marriage; and, sub-junct thereto, to the use of the first and every other son or daughter of the marriage in the usual course of family settlement, with remainder to the said *John Bagwell* in fee:

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and as to the residue of the said lands, namely, the lands of Carrigavilla and Kilmore (together with certain other denominations not included in the deed of the 28th of October, 1815), upon trust that they, the said *William Bagwell* and *Hamilton Bagwell*, or the survivor, &c., should, with all convenient speed, as soon as they should be thereto required in writing by the said *John Bagwell*, by sale or mortgage of the fee and inheritance of and in the said lands and premises, levy and raise so much money as would be sufficient to pay off and discharge the several debts and incumbrances specified and set forth in the before-mentioned schedule endorsed on the said deed, together with the interest thereof respectively, and all such costs, charges, damages, and expenses, as the said trustees, or the survivor of them, should be put to or sustain in the execution of the trusts thereby in them reposed; and upon trust, until such sale, to permit the said *John Bagwell* to receive the rents and profits of said lands and premises.

Among the incumbrancers enumerated in the schedule to this deed, *Mr. Putland* was ranked the third; thus, “*George Putland, Esq., by mortgage, 2000l.*” No sale was ever had under this trust, the said *John Bagwell* never having required the trustees to act; but by a further deed of the 18th of March, 1822, and made between the said *John Bagwell* of the first part; *Hugh Moore*, a judgment creditor of the said *John Bagwell*, of the second part; and *Charles Langley* and *Robert Simpson* of the third part; reciting that the said *John Bagwell* was indebted to the several persons named in the schedule thereon endorsed in the several sums set opposite to their respective names; and further, that the said *John Bagwell* was minded to vest as well the several lands and premises, to which he was

under the settlement of the 28th of July, 1819, but tenant for life, as those of which he was thereunder seised in fee-simple, in the said *Charles Langley* and *Robert Simpson*, upon the trusts therein declared ; the said deed witnessed that the said *John Bagwell* conveyed all his estate and interest in the lands of Lisronagh and Shanbally, and in the lands of Carnigavilla and Kilmore, unto the said *Charles Langley* and *Robert Simpson*, and their heirs, upon trust to pay off and satisfy the several debts and charges specified and set forth in the said schedule thereon endorsed, and all interest then due and thereafter to become due ; and when the same and all the interest due thereon respectively should be fully liquidated and discharged, then upon trust to reconvey the said lands to the said *John Bagwell*, his heirs and assigns.

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The charge of 2000*l.*, due to *George Putland*, was specified in the schedule to this deed, as the third incumbrance.

It appeared that the trustees, *Langley* and *Simpson*, never acted in the trusts of this deed ; and that *Hugh Moore* never executed it, having been named a party, as it was stated, without his knowledge or consent.

The bill in the second cause was filed on the 19th of June, 1838, by *George Putland*, against the said *John Bagwell* and several others, and subsequently an amended bill, on the 15th of August, 1840 ; which latter prayed, that an account might be taken of what was due and owing to the said *George Putland*, under and by virtue of the articles of the 28th of October, 1815, and for payment of such sum ; or, in default thereof, for a sale of the lands comprised in the

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said articles ; and that the trusts of the deed of the 28th of July, 1819, might be carried into execution, and the for that purpose, an account might be taken of the sums due upon foot of the several charges mentioned in the schedule to the said deed annexed ; and also an account of all incumbrances prior to the execution of said deed ; and that out of the produce of the sale, the Plaintiff there *George Putland*, and the other creditors whose debts were mentioned in the schedule to said deed, might be paid according to their priorities ; and that, if necessary, the trusts of the deed of the 18th of March, 1822, might be also carried into execution.

On the 5th of April, 1839, the bill in the first cause was filed by *Robert Law*, a mortgagee of said lands, by virtue of a mortgage bearing date the 2nd of November, 1825.

George Putland having died in the month of November 1841, the cause was revived by his personal representative, *George Evans*, the Plaintiff in the second cause ; and on the 3rd of February, 1842, both causes came on to be heard, when a decretal order was pronounced, whereby was referred to the Master to take an account of what was due to the Plaintiff in the first cause, on foot of the mortgage of the 2nd of November, 1825, and also an account of all incumbrances prior to and contemporaneous with the said mortgage ; and to inquire and report which of the said lands and premises in the pleadings mentioned were affected by the same respectively, and to what uses the lands stood limited in relation to the said several incumbrances. And it was further ordered, that the proceedings in the second cause should be stayed until the return of the Master.

ter's report; with liberty to the Plaintiff therein to prove his demand under said decree; and that the Plaintiff and all the Defendants in said second cause should have the same benefit of the accounts to be taken under the decree, as if same were taken in the second cause. And it was ordered, that the question should be reserved, whether the Plaintiff in the second cause was entitled to have the trusts of the deeds of the 28th of July, 1819, and the 18th of March, 1822, or either of them, carried into execution, or to be paid the whole arrear of interest on the principal sum due to him. And the Master was ordered to report both ways, as well what was due to the said Plaintiff, in case he should be decreed entitled to the whole arrear of interest, as also what was due to him in case he should only be decreed entitled to interest for six years prior to the filing the original bill in the said second cause.

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On the 19th of May, 1843, the Master made his report, and after setting forth the articles of the 28th of October, 1815, and finding that the said sum of 2000*l.* was an equitable charge affecting the lands comprised in the said articles, and the third in point of priority, he found, that if the Plaintiff in the second cause was entitled to interest on the said sum of 2000*l.* from the date of the articles of 28th of October, 1815, after deducting payments already made to him, there would remain due to him the sum of 2114*l.* 16*s.* 2*d.*; but if only to interest for six years prior to the filing of the bill, then, after giving credit for like payments, a sum of 287*l.* 3*s.* 2*d.*

The cause now came on to be heard upon the report.

On the part of *George Evans*, the Plaintiff in the second cause, certain letters were read in evidence to connect the

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said *George Putland* with the deeds of the 28th of July, 1819, and the 18th of March, 1822, and to establish that by those deeds a trust was created for the payment of said principal sum of 2000*l.* and interest. In one of these letters, which bore date the 17th of August, 1816, and was addressed by the said *John Bagwell* to *George Putland*, *Bagwell*, after expressing his obligations to *Putland*, for offering to relinquish the estate, and requesting the 2000*l.* should be allowed to remain a charge on the estate, stated, “ I beg leave to remark, that it is my intention, should you comply with this plan, to vest my estate in trustees’ hands, so as to pay off both principal and interest as soon as possible.”

Argument.

The questions, which were argued at the hearing, were, first, whether *George Putland*, or his representative, *George Evans*, the Plaintiff in the second cause, could be considered as a *cestui que trust* under the deeds of July, 1819, and March, 1822; and, secondly, if so, whether the claim of such Plaintiff for interest was saved by the operation of the 25th section of the 3 & 4 Will. IV. c. 27; or whether, notwithstanding that section, it was to be governed by the 42nd section of that Statute, and the claim consequently confined to the amount accruing from the period of six years prior to the filing of the bill.

On the first question the following cases were cited: *Walwyn v. Coutts*(a), *Garrard v. Lord Lauderdale*(b), *Acton v. Woodgate*(c), *Field v. Lord Donoughmore*(d), *Lord Lucan v. La Touche*(e), *Gibbs v. Glamis*(f):

(a) 3 Mer. 707; 3 Sim. 14.

(e) 2 Drury & W. 271; 7 Clark

(b) 3 Sim. 1; 2 Russ. & M. 451. & F. 772.

(c) 2 Mylne & K. 492.

(f) 11 Sim. 584.

(d) *Ante*, vol. i. p. 227.

and on the second question, *Kelly v. Kelly(a)*, *Fergus v. Gore(b)*, *Burne v. Robinson(c)*, *Scott v. Jones(d)*, *Salter v. Cavenagh(e)*, *Dillon v. Cruise(f)*, *Lord St. John v. Boughton(g)*, *Phillippo v. Munnings(h)*, *Berrington v. Evans(i)*, *Beckford v. Wade(k)*.

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Mr. J. Scott, Mr. William Brooke, and Mr. Brewster, for Mr. Robert Law, the Plaintiff in the first cause.

Mr. Serjeant Warren, Mr. Serjeant Keatinge, and Mr. R. Franks for George Evans, the Plaintiff in the second cause.

THE LORD CHANCELLOR :—

Judgment.

If in this case I were compelled to decide the question, which has been argued at the bar, upon the construction of the 3 & 4 Will. IV. c. 27, I should, probably, take time to consider my judgment, but the peculiar circumstances of the case render it unnecessary for me to do so.

Mr. Putland was equitable mortgagee of four denominations of the lands, when Mr. Bagwell entered into the settlement of 1819, for as the contract for the sale went off, he of course became in equity an incumbrancer to the extent of his advance. The deed of 1819 was a family settle-

(a) 6 Law Rec. N. S. 222.

(f) 3 Ir. Eq. R. 70.

(b) 1 Sch. & L. 197.

(g) 9 Sim. 219.

(c) 1 Drury & W. 658.

(h) 2 Mylne & C. 219.

(d) 1 Russ. & M. 255; 4 Clark &

(i) 1 Younge & C. 434.

F - 382.

(k) 17 Ves. 87.

(e) 1 Drury & W. 668.

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ment on the part of Mr. *Bagwell*, by which he settled two out of the four denominations to certain uses, and limited the other two denominations to trustees of his own choice, to sell or mortgage them, whenever he, the settlor, should require them so to do, for the purpose of raising money to pay off the incumbrances specified in the schedule to that deed, in exoneration of the two denominations that were put into settlement; and, subject to this trust, he reserved the equitable fee to himself. Mr. *Putland* was not a party to this deed; but his debt was one of those mentioned in the schedule. Now, to stop here—which, I think, we must do, for the subsequent deed of 1822 was abandoned and never carried into execution. It would be impossible, after the decisions in *Walwyn v. Coutts*(a) and *Garrard v. Lord Lauderdale*(b), to contend, that the creditor is entitled to derive any benefit under that deed; the case stands upon the deed of 1819 alone.

The doctrine of *Walwyn v. Coutts*, *Garrard v. Lord Lauderdale*, and that class of cases, has, I think, gone beyond the intention of those who originally introduced it; do not, however, mean to express any opinion as to the extent to which the doctrine ought to be maintained. No doubt, if a creditor hearing of the existence of an instrument of this nature, for the benefit of which he never made any stipulation, were allowed, at his own discretion, to enforce that benefit; if half an hour after he acquired his information he were to be permitted to file a bill to carry into execution the trusts of the deed in his favour, the practice would lead to serious inconvenience.

(a) 3 Mer. 707; 3 Sim. 14.

(b) 3 Sim. 1; 2 Russ. & M. 451.

The right of Mr. *Putland* was perfectly independent of Mr. *Bagwell*, and the latter could not by any act of his affect it. But the question is, whether Mr. *Bagwell*, by the deed of 1819, placed Mr. *Putland* in such a position, that at any moment he could have filed a bill to execute the trusts of that deed. It is quite clear that he did not. It is not material to inquire how far the cases go, or whether they can all be supported; they are, to this extent at least, clear and conclusive. The settlor in this case left the creditor his lien, and did not affect to interfere with his prior right; he created no trust to operate or to be executed, unless he himself should think proper to call the trusts into activity. It is plain, that he never intended they should be executed by any of the creditors against himself, or his own will. Mr. *Bagwell* and the persons interested in the settled lands (if otherwise competent) could have put an end to the arrangement made by the deed of 1819, without obtaining the consent of Mr. *Putland*, or any of the creditors named in the schedule to that deed. This case is governed by the rule laid down in the authorities to which I have referred, and it would be impossible for me to say, that Mr. *Putland* is now entitled to the benefit of the trusts of that deed, unless I was prepared to hold, that the creditor had a right to call for an execution of the trust, though the person creating it provided that it should never be exercised without his consent. I am of opinion that Mr. *Putland* cannot be considered a *cestui que trust* under the deed of 1819, so as to be entitled to insist adversely on the execution of the trust(a).

A question might arise which, however, I am not at present called upon or prepared to decide, viz., whe-

(a) *Wilding v. Richards*, 1 Collyer, 655.

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ther the owner of the two denominations limit the uses of the settlement could call for an execution of the trust, by insisting upon all the incumbrances affected the four denominations being paid off out of other denominations; I think the latter would be a proper fund; the rights of Mr. *Putland*, as an equitable mortgage, remain untouched. No doubt, in this case the position of the party is not precisely the same as in the case of *v. Glamis(a)*, for Mr. *Putland* has an interest in the estate, but this legal principle applies to both the cases. If the trusts of the deed had been communicated to the creditor and he had acquiesced in and acted upon them, and allowed to do so, then the question agitated in the case of *Gibbs v. Glamis* might have arisen, whether after he had adopted the deed, and the parties had acquiesced in the adoption, its benefit could be withdrawn from him. This would be a grave case requiring much consideration, but it is not the case here.

As to the second question raised at the bar, the answer to which I have taken of the case renders it unnecessary for me now to consider it. It is a question of the utmost importance. The 25th section of the late Statute of Limitations, providing for express trusts, renders lapse of time unimportant in all cases within the section, that is, both as to the *cestui que trust* and his trustee, until the trust is disturbed, and that disturbance can only be effected by a denial of the trust as takes place, when the trustee sells to a third party for valuable consideration the property held by him in trust. The question then is, whether the rule as to cases of express trust was meant to apply

(a) 11 Sim. 584.

40th and 42nd sections, and perhaps the difficulty may be greater as to the latter section. A man may be a *cestui que trust* and yet not be able to enforce his rights through the trustees against third persons. I do not, however, mean to give any opinion upon the question.

I rule the special point against the Plaintiff in the second cause, and declare him to be only entitled to interest to be computed on the principal sum from the period of six years prior to the filing of the bill in the second cause.

Reg. Lib. 88, fol. 238, 1843.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

GOFFRY MARTYN, KATHERINE his Wife, JOHN FYNN,
and HANNAH KALCUTT, Spinster, *Plaintiffs*;
WILLIAM NUGENT M'NAMARA, FRANCIS M'NAMARA,
SIR LUCIUS O'BRIEN, and SIMON GEORGE PURDON,
Defendants;

AND

FRANCIS M'NAMARA, *Plaintiff*;
FRANCIS M'NAMARA KALCUTT, WILLIAM N. M'NAMARA,
SIR LUCIUS O'BRIEN, SIMON G. PURDON, GEOFFRY
MARTYN, KATHERINE his Wife, JOHN FYNN, HANNAH
KALCUTT, RICHARD BLAKE, Junior, and JANE BLAKE,
otherwise KALCUTT, his Wife, and Others, *Defendants*.

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June 8, 9.

WILLIAM NUGENT M'NAMARA married *Susanna Finucane* in the year 1798; and by indenture, dated the 14th of March in that year, made between *Francis M'Namara* and *William Nugent M'Namara*, his eldest son, of the first part; the *Hon. Mathias Finucane* and *Susanna Finucane*, of the second part; *Sir Edward O'Brien* and *George Stackpoole*, of the third part; *Richard*

By marriage settlement, Blackacre and Whiteacre were expressed to be conveyed to trustees by *A.*, the father of *B.*, the intended husband. At the time of the settlement *A.*

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was not in possession of Blackacre; his title was disputed, and ultimately defeated. Whiteacre was held under leases for lives, and was subject to head rents. The settlement contained a provision, that in case *A.* should purchase the head rents of Whiteacre, they should be subject to the trusts of the settlement, and *A.* should have power to charge the property so purchased with the amount of the purchase-money. By the settlement *A.* covenanted with the father of the intended wife for good title generally, and *A.* and *B.* covenanted with the trustees for good title notwithstanding any act done by them.

A. purchased the head rents, charged the amount of the head rent on the property, and by a voluntary deed appointed the charge to his daughter.

Seemle, the general covenant for good title with the father of the intended wife was, in construction, to be cut down by the limited covenants with the trustees, and that therefore the defeasance of *A.*'s title to Blackacre was not a breach of covenant.

Held, that even though there was a breach of the general covenant, yet the appointment of the charge to the daughter was valid as against the parties entitled to damages in consequence of that breach, it not having been proved that *A.* was indebted to the extent of insolvency, at the time of the appointment.

B. by deed confirmed the appointment to the daughter, and was the personal representative of the covenantor:—*Held*, that by his confirmation, he had defeated his right to sue the covenantor, and that the benefit of the covenant was lost to those entitled to estates in remainder under the settlement.

Martin and *Andrew Kent*, of the fourth part; *Thomas Gould* and *Anthony Hogan*, of the fifth part; and *Jane M'Namara*, the wife of *Francis*, of the sixth part; being the settlement executed upon the occasion of said marriage, after reciting as therein, *Francis* and *Wm. Nugent M'Namara* conveyed to *Sir Edward O'Brien* and *George Slackpoole*, and their heirs, certain freehold estates, and also the lands of *Muckinish*, *Fahy*, *Burrenoramalla*, and also certain other lands therein described as demised by *Sir Ulick Blake, Bart.*, to *William M'Namara*, the father of the said *Francis*, situate in the county of *Clare*, and held under leases for lives, with covenants for perpetual renewal contained therein, to hold from and after the solemnization of the marriage, to the following uses, viz:—as to some of the lands as an immediate provision for *William Nugent M'Namara*; and as to the residue of said lands (including those above particularly named), upon trust to raise by sale or mortgage 8000*l.* for the younger children of *Francis* as he should appoint, or, in default of appointment, in equal shares, and then to the use of *Francis* for life, remainder to trustees to preserve, remainder to *Richard Martin* and *Andrew Kent* for ninety-nine years, to secure a jointure by said deed next provided for *Jane M'Na-*

mara, since deceased ; then to the use of *William Nugent M'Namara* for life, remainder to trustees to preserve, &c. ; remainder to the first and other sons of the marriage successively in tail male, remainder to the first and other sons of *William Nugent M'Namara*, and any after taken wife successively in tail male, with an ultimate limitation to *Francis M'Namara* in fee.

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This deed contained a provision in the words following:—"It is hereby declared and agreed by and between the said parties to these presents, that in case the said *Francis M'Namara* shall at any time hereafter purchase any of the head rents payable out of any of the lands and premises hereby granted and released, or intended so to be, such purchase or purchases shall be and enure to the uses and limitations hereinbefore mentioned of and concerning the lands and premises, the head rents whereof shall or may be so purchased, and that the said *Sir Edward O'Brien, George Stackpoole*, and their heirs, shall, immediately after such purchase or purchases, stand and be seised of such lands and premises, to and for the same uses and limitations so as hereinbefore limited and appointed of and concerning the said lands and premises previous to the making such purchase or purchases: Provided always, however, and it is hereby declared and agreed by and between the said parties to these presents, that the said *Francis M'Namara* shall and may have full power and authority, and he is by these presents enabled, to charge the lands and premises, the head rents of which he may so as aforesaid purchase, with the amount of the purchase-money thereof, and that such purchase-money shall or may be raised or

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levied by sale or mortgage of said lands and premises, or of a competent part thereof."

The settlement then proceeded thus:—"And the said *Francis M'Namara*, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, &c., to and with the said *Matthias Finucane*, his heirs, &c., that the said lands, &c., limited to *William Nugent M'Namara*, as an immediate provision, &c., are of the clear yearly value of 1400*l.*, of lawful money of this realm, over and above all reprises and outgoings whatsoever; and that the lands, &c., so as aforesaid limited to the said *Francis M'Namara* during his life, and after his decease to the said *William Nugent M'Namara*, and the issue of the said intended marriage, are of the clear yearly value of 2100*l.*, of lawful money, over and above all reprises and outgoings whatsoever; and that he, the said *Francis M'Namara*, and the said *William Nugent M'Namara*, or one of them, are or is seised of a good and sufficient estate in the land, and fully authorized and empowered to convey and assure all and singular the aforesaid towns, lands, &c., to the uses and subject to the limitations hereinbefore expressed and declared concerning the same; and further, that he, the said *Francis M'Namara*, and his assigns, shall and will, during his life, regularly renew the leases of such of the aforesaid lands and premises, as are held under leases with covenants for renewal contained therein." Then followed covenants for suffering a recovery of some of the lands, after which came this covenant:—"And the said *Francis M'Namara* doth hereby for himself, his heirs, executors, and administrators, covenant, &c., with the said *Matthias Finucane*, his heirs, executors, and administrators, that

all and singular the said hereby granted and released premises are free from, and not subject or liable to any charge or incumbrance whatsoever affecting the same, save only and except the leases and agreements for leases made thereof: and in order effectually to secure and indemnify the said hereby granted and released premises, of and from any charge or incumbrance, which may affect the same, he, the said *Francis M'Namara*, doth hereby for himself, his heirs and assigns, covenant, &c., to and with he said *Matthias Finucane*, his heirs, executors, and administrators, that the lands of Gortaclab, &c., of the which the said *Francis M'Namara* is now lawfully seised and possessed, shall be charged and chargeable with all and every such sum or sums of money as shall or may be raised or levied out of the aforesaid hereby granted and released premises, or any part or parcel thereof, in order to pay and satisfy any charge or incumbrance which may now affect the same, and for that purpose that he, the said *Matthias Finucane*, and his heirs, shall and may, by sale or mortgage of the aforesaid lands and premises, or of a competent part thereof, and also by and out of all such real estate as the said *Francis M'Namara* now is or hereafter shall be seised or possessed of, and also out of such personal estate as the said *Francis M'Namara* shall die possessed of or entitled unto, raise and levy such sum and sums of money as shall or may be recovered out of the hereby granted and released premises, or any part thereof, for or on account of any charges or incumbrances which may now affect the same, together with such costs and expenses as may be occasioned by their resorting to the hereby granted and released premises for the payment of such charges and incumbrances." Subsequently came a covenant in these words, viz.:—"And the said

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Francis M'Namara and William Nugent M'Namara for themselves severally, and for their respective heirs, executors, administrators, and assigns, do and each of them doth covenant, &c., to and with the said *Sir Edward O'Brien and George Stackpoole*, their heirs and assigns, that for and notwithstanding any act, matter, or thing whatsoever, at any time heretofore had, made, done, &c., or at any time hereafter to be had, made, done, &c., to the contrary by them the said *Francis M'Namara and William Nugent M'Namara*, or either of them, all and every the said towns, lands, &c., hereby granted and released, or intended so to be, shall and lawfully may from time to time, and at all times hereafter, remain, continue, and be to and for the several uses, intents, and purposes, upon the trusts, and subject to the provisoes and agreements in and by these presents mentioned, &c., concerning the same; and shall and may be accordingly peaceably and quietly had, held, possessed, and enjoyed without the let, suit, trouble, denial, eviction, or interruption of or by the said *Francis M'Namara and William Nugent M'Namara*, or either of them, their or either of their heirs or assigns, or for or by any person or persons lawfully claiming, or to claim any estate, right, title, power, trust or interest into, or out of the said hereby granted and released lands and premises, or any of them, or any part thereof, from by, under, or in trust for him or them, or either of them. The usual restricted covenant for further assurance by *Francis and William Nugent M'Namara*, and all persons lawfully entitled or claiming through or under them concluded the deed.

There was issue of the marriage, one son, *Francis M'Namara*, the younger, who was one of the Defendants.

in the original cause, and the Plaintiff in the cross cause. *Francis M'Namara* claimed the lands of Fahy, Muchinish, and Burrenoramalla, under a lease for lives, with a covenant for perpetual renewal, but had been ousted from possession in the year 1780 by means of an ejectment brought by a person named *Lynch*. At the time of the execution of the settlement of 1798 an ejectment brought by *Francis M'Namara* against *Lynch* to recover the possession of these lands was pending, and in 1799 *Francis M'Namara* obtained a verdict, upon which, however, a bill of exceptions was taken and allowed by the Court above, and their decision was affirmed by the House of Lords on appeal.

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In the years 1810 and 1813 *Francis M'Namara* purchased the head rents of all the lands included in the settlement, which were held under leases of lives with covenants for perpetual renewal, and for these purchases he paid the sums of 170*l.*, and 2590*l.*

By indenture dated the 2nd of July, 1819, and made between *Francis M'Namara* of the one part, and trustees of the other part, after reciting, amongst other matters, the marriage of *Dora Katherine M'Namara*, a daughter of *Francis*, with *William Calcutt*, and the power contained in the deed of 1798 of charging the purchase-money of the head rents of the lands contained in that settlement, on those lands, and reciting the said purchases for the sums of 170*l.*, and 2590*l.*, it was witnessed that in pursuance of said power, *Francis* conveyed the lands to trustees, upon trust, subject to his own life estate, by sale or mortgage, to raise the said sums of 170*l.* and 2590*l.*, and to invest them in the purchase of lands, and to pay the

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interest thereof, or the rents and profits of the lands, to *Dora Katherine Calcutt*, for her life, and after her decease upon trust for her children by *William Calcutt*, as she should appoint, with limitations over to the children in default of appointment.

Francis M'Namara made his will dated the 2nd of November, 1819, and thereby, after referring to his power, under the settlement of 1798, to charge 8000*l.* for his younger children, he exercised that power, and appointed a sum of 2000*l.*, part of that charge, to *Dora Katherine Calcutt*, and the residue to his younger sons. The testator also bequeathed certain lands called the Bishop's Quarter, of which he was possessed for terms of years, to his wife, *Jane M'Namara*, whom he appointed his executrix. The testator died in the year 1821.

Dora Katherine Calcutt had issue, four children, viz., *Francis M. Calcutt*, *Katherine Calcutt*, afterwards *Martyn*, *Hannah Calcutt*, and *Jane Calcutt*, afterwards *Blake*; and under the wills of *Dora Katherine* and *William Calcutt*, their said three daughters became entitled to said sums of 170*l.*, 2590*l.*, and 2000*l.*, in all 4760*l.* In 1836 *Jane Calcutt* married *Mr. Blake*, and by marriage articles dated the 22nd of July in that year, her share was made the subject of settlement.

By indenture, dated the 23th of February, 1823, made between *Jane M'Namara* of the first part, *William Nugent M'Namara*, of the second part, and *William* and *Dora K. Calcutt* of the third part, after reciting the deed of 1819, and the death and will of *Francis M'Namara*, and that *William Nugent M'Namara* had lodged a *caveat* and in-

stituted proceedings in the Prerogative Court for the purpose of impeaching that will, and had also filed two bills in the Court of Exchequer for the purposes of setting aside the deed of 1819, and of obtaining possession of certain lands; and reciting other legal proceedings, in some of which *William* and *Dora K. Calcutt* were Plaintiffs, and in other suits to which *Jane M'Namara* was a party, and that it had been agreed that all suits should cease and be settled, it was witnessed that the said parties mutually agreed that the *caveat* should be withdrawn, and that all suits should cease, and all parties should abide their own costs, and that the several bills should be dismissed without costs, and that *William Nugent M'Namara* should pay within four years the sum of 2000*l.* to *Jane M'Namara*, and *William* and *Dora K. Calcutt*. And by this deed, after further reciting that *Dora Katherine Calcutt* was entitled in her own right to the said sum of 4700*l.*, with interest, *William* and *Dora K. Calcutt* covenanted not to call in or take any proceedings to raise said sum of 4700*l.* for seven years, and *William Nugent M'Namara* ratified and confirmed the deed of 1819, and the will of *Francis M'Namara*, and covenanted to pay interest during the seven years on the 4760*l.*, and agreed that in case the interest fell into arrear, *William* and *Dora K. Calcutt*, and their assigns, should be at liberty to raise the principal sum.

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Under the foregoing circumstances, the original bill in these causes was filed on the 12th of April, 1842, by *Katherine Martyn*, and *Geoffry*, her husband, *Hannah Calcutt*, and the trustees of *Jane Blake's* marriage settlement, against *William Nugent M'Namara*, and his son *Francis*, for the purpose of raising the said charges of 170*l.*, 2590*l.*, and 2000*l.*: this claim was not disputed, except in the manner mentioned below.

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Statement.

The cross-bill was filed by *Francis M'Namara*, as first tenant in tail under the settlement of 1798, against the Plaintiffs in the original cause, and the other Defendants, making the following case, viz:—That as by the eviction of the lands of Muchinish, Fahy, Burrenoramalla, &c., the settlors' covenant for good title had been broken, *Francis*, the Plaintiff, was entitled to compensation in the nature of damages, out of the assets of *Francis*, the settlor; that the said sums of 170*l.* and 2590*l.*, formed part of those assets, and that *Francis*, the Plaintiff, was accordingly entitled to retain those sums *pro tanto* for his indemnity. *Francis M'Namara* made the same case by his answer in the original cause; and the trustees of *Jane Blake's* settlement-alleged in their answer to the cross-bill, that they were purchasers for valuable consideration without notice. *Jane M'Namara* died in 1834, and in 1836 a creditor's suit was instituted by persons named *Lynch*, to whom she was indebted, and on the 2nd of June, 1840, a decree for a sale of the lands of Bishop's Quarter for the payment of the creditors of *Jane* was pronounced. *Francis M'Namara* also insisted by this cross-bill that these lands formed part of the assets of *Francis*, the settlor, and were available for the purpose of compensation or indemnity to him, and the Messrs. *Lynch* were accordingly made parties Defendants.

It appeared that the Hon. *Matthias Finucane* died in 1814, and that letters of administration, with his will annexed, had been granted to *William Nugent M'Namara*, who was consequently his legal personal representative.

Argument. Mr. Moore, Mr. O'Brien, and Mr. Lysaght, for the Plaintiffs in the original cause.

The 2760*l.* does not constitute part of the assets of *Francis M'Namara*, the settlor, and the Defendant, the tenant in tail, has no claim as against that fund, on account of the eviction of some of the settled lands. There is no evidence to shew that, at the time of the execution of the deed of 1819, *Francis*, the settlor, was indebted to any amount. In *Jones v. Croucher(a)*, it was held that settlements of personal estate were not within the Statute 27 Eliz. c. 4, and that such settlements, though voluntary, if made by persons not indebted at the time, were good against subsequent purchasers for valuable consideration. A similar point was decided by the Court of Exchequer in this country, in the case of *Ashe v. Lowe(b)*. This is not the case of a voluntary assignment of an existing charge, but of the voluntary exercise of a power. The trustees of *June Blake's* marriage articles are purchasers for valuable consideration, and *Francis M'Namara* had notice of those articles. *George v. Milbanke(c)*.

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Mr. Serjeant *Warren*, Mr. *Brooke*, and Mr. *Webber*, for *Francis M'Namara*.

The power to charge in the settlement of 1798 is followed by the covenants of the deed. The first covenant for title is unconditional and general, and cannot be cut down in its operation, merely because it is followed by restricted covenants. The covenantors are not the same. In the former case it is with the father of the intended wife that the covenant is made; in the latter with the trustees of the settlement. The power to charge the lands was a mere power and not a trust, and was intended to be subject to the covenants, and the covenant was confessedly bro-

(a) 1 Sim. & S. 315.
(c) 9 Ves. 190.

(b) 1 Law Rec. N. S. 145.

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ken by the eviction, before the execution of the power; the charge so created became to all intents the personal property of the settlor, just if it had been in terms created by the settlement itself, and accordingly that charge became liable to the debts of the owner, and in the hands of a volunteer constitutes part of his assets; *Lord Townsend v. Wyndham*(a). In the *Treatise of Powers*(b) it is said, "Equity goes a step farther, and holds, that where a man has a general power of appointment over a fund, and he actually exercises his power, whether by deed or will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors, in preference to the claims of his legatees or appointees."

Priddy v. Rose(c), and *Wallace v. The Marquess of Donegal*(d) were also referred to.

Mr. Serjeant *Keatinge*, Mr. *Monahan*, and Mr. *Blake*, for the Messrs. *Lynch*, the Plaintiffs in the creditors' suit.

The parties who complain of breaches of the covenants contained in the deed of 1798 have so long lain by, that this Court will not now give them any relief against the lands of Bishop's Quarter, as part of the assets of the covenantor in that deed. A new legal estate was acquired in those lands, in consequence of renewals from time to time granted to *Jane M'Namara*, and her creditors have the better equity. In *Ray v. Ray*(e), it was decided, that after the lapse of six or seven years, this Court will restrain a creditor of an executor from taking in execution the goods of a testator for the executor's debt, Sir *Thomas Plumer* observing(f), "upon what principle of

(a) 2 Ves. Sen. 1; 10.

(c) 3 Mer. 87.

(e) Coop. 264.

(b) Vol. ii. p. 29.

(d) 1 Drury & Walsh, 461.

(f) Page 269.

Equity is the Court to interfere with the right at law? If the Plaintiff had any right to consider the renewed lease as made for the benefit of the testator's estate, is it not fair to say that he has waived that right at this distance of time? The Defendant has the law on his side, and at least an equal equity with the Plaintiff." It is also to be observed that the deed of 1798 does not contain any specific recital of the title of the granting party. At the time of the execution of this deed, the lands were not in the possession of the settlor; there was nothing in the deed but an alleged right of possession, which was then disputed and subsequently proved to be unfounded. The tenant was therefore illegal.

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Mr. Pigot, Mr. Fitzgibbon, and Sir Colman M. O'Loughlin for William Nugent M'Namara, contended that the deed of 1823 merely operated to confirm that of 1819.

Mr. O'Brien, in reply.

THE LORD CHANCELLOR:—

Judgment.

There is considerable difficulty in this case, and I must read over all the documents before I part with it. Perhaps it is a case which should go to a court of Law; some of the questions which have been raised seem to make that the proper course to adopt.

It appears that in 1798 a marriage settlement was executed of certain lands, which were not then in the possession of the parties to the deed. Those lands were at that time, and subsequently to the execution of the deed, the

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subject of litigation ; they therefore could not be properly made the subject of conveyance. A question of champerty might arise, and a difficulty may exist, as to the validity of the covenants relating to the lands.

Subject to this question as to the validity of the covenants, the case assumes this shape : certain estates held in fee simple, and also lands held under leases for lives renewable for ever, are conveyed to the trustees of the settlement upon ordinary trusts ; and then there is a covenant by the settlor, with the lady's father, that the property is of a given value ; this is followed by a general covenant for good title, and then comes a particular covenant by the settlor during his life to renew the leases. The first and third of these covenants are limited—the first relating to value, and the third to acts to be done by the covenantor during his own life ; but the second covenant for good title, considered by itself, would appear to be general ; and the question would be whether, looking at the rest of the deed, at the subsequent covenants for title by the settlor and his son, the covenants for quiet enjoyment and further assurance, which are strictly limited to the acts of the covenanting parties themselves and those claiming under them, it would not be inconsistent with the general tenor of the deed to hold that this second covenant should be construed as unlimited, so as to bind the parties in an absolute and unrestricted manner. The subsequent covenants are not covenants by wholly different persons, but covenants by the former covenantor and an additional person. It would be absurd for a party in the same deed in relation to the same property, to enter into the usual limited covenants, and yet bind himself absolutely to pay damages in case the title to the lands should, from an

cause, prove defective; and that, not to the party who would be the proper hand to receive the money for the benefit of the wife and issue of the marriage. I think one covenant must give way to the other, and that there was a mistake in the general covenant. The settlor meant to covenant only for what he had, for what it was in his power to settle, otherwise the covenant might ruin him; for the trustees would be compelled to proceed against him at law for the breach of the covenant, and he would not only lose the estate, but would be obliged to pay damages for that loss. The Court ought, therefore, to be stute to cut down the general covenant, which would seem to be the best construction of the whole instrument. but this is not my province. I am not now to decide the question as to the legal extent of this covenant.

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By the deed *Francis M'Namara* settled lands, of which he was seised *quasi* in fee under leases renewable forever; and he stipulated, that in case he should afterwards choose (for there was not any obligation imposed on him) to buy the inheritance and head rents, they also should stand limited to the uses of the settlement, and that he should have power to charge the lands with a sum equal to the amount of the purchase-money. The event happened, he did buy the inheritance, and he declared his intention to exercise his power, and charge the lands with the purchase money. It is said, that there being a breach of covenant as to part of the settled estates, his charge, as soon as the power was exercised, created or rather became assets for the benefit of creditors, and that the claims of such creditors must be preferred to those of the appointee of the charge. The purchase was made with his own money, and at the time of the

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purchase he said that he intended to keep the money charged on the lands for the benefit of his daughter, *Dora Katherine M'Namara*, and by the deed of 1819 he settled the charge on her and her children. It was said that this was like the case of a bare authority; but I do not see here any distinction between power and property. To me the party appears never to have lost his dominion over this money, which was always his own personal estate. It was his own money laid out in this particular manner, like the investment of so much money upon a mortgage: the transaction was one act, and was wholly executed at the same moment. The charge was a continuation of his personal estate, which never was out of him as such. It was his intention always to retain it, and there was not any thing to restrict that intention. How then can any question arise in this case as to the distinction between power and property?

Cases were referred to, which were said to establish the proposition universally, that where there is a general power to charge lands with a sum of money, and the donee exercises the power, whether the power is exercised in favour of the donee himself, or of another person, the sum charged constitutes part of the personal assets of the donee, and is liable to his debts. If a sum of money is settled upon such trusts as a man shall appoint, no doubt, when he exercises his power of appointment, that sum becomes part of his assets, is liable to his debts, and the appointee takes under him, and consequently subject to his liabilities. But this sum is not distinguishable from his other personal property. Can he not dispose of it like any other part of his property, supposing him not to be indebted at the time of such disposition; and will

disposition be effectual against all his creditors, to obtain specific liens upon it. It cannot be that the liability of *Francis M'Namara* to be damages created a specific lien upon this purchase. It is now clearly settled, by *Lush v. Wil-* followed by subsequent authorities, that if a debtor indebted to the extent of insolvency at the time he makes a voluntary settlement, that settlement cannot be afterwards impeached by his creditors; not within the English Act of the 27 Elizabeth corresponding Statute(b) in this country. To a settlement fraudulent against creditors, they are only the creditors at the time, but the settlor indebted very largely to those creditors; but in this case there was no such circumstance. I am therefore for the purposes of the argument, that this is a general one, and that it is valid: no one to the extent of the damages, nor is it shewn that *M'Namara* was at the time embarrassed in his finances. I do not see how the fund is in any way got at.

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As, then, the question on the deed of 1823, and will be difficult for Major *M'Namara* to escape liability under that instrument. The charge was laid over the whole estate; and subject to it the estate was settled on *William and Francis*. At the death of *Francis*, his will was disputed by *William M'Namara*, and litigation having arisen on the compromise was agreed on, and this deed was

384; see *Townsend v. Manders*, 4 Ir. Eq. Rep. 2 Beav. 340; *Norcutt* 334. Dig & P. 100; *Manders* (b) 10 Car. L., Scss. 2, c. 3.

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executed, by which *William M'Namara* ratified the deed of 1819: the intention was to ratify that deed, and the particular charge in favour of *Dora*; but then it was as a charge on the inheritance that the deed was ratified. *William* might have said to any person who came to raise the charge, that he had an Equity against the remainder-man, who was bound to contribute, and should be brought before the Court. But if circumstances have taken away that Equity against the remainder-man, how can he retain his life estate as against the person entitled to the charge? The charge ransacks the whole estate. The owner of the charge may take any part he pleases. If it has become impossible to raise the charge out of the inheritance, it may fall heavily on the owner of the life estate; but this cannot defeat or affect the rights of the party entitled to the charge.

The deed of 1819 is rather singular in its form, for by it the legal estate is conveyed in trust to raise the purchase-money laid out by *Francis M'Namara*. To enforce their claim to the estate, therefore, the parties must have come into a Court of Equity, and there they must have done what the purchaser intended should be done; they must have paid the charge, or this Court could not have given them the estate. Cases were referred to to show that Equity will not confer a benefit upon any person while there remains an obligation which is to be performed by him. I do not think that the present case comes fairly within that class of cases. Here a new subject is introduced. *Francis*, the settlor, was not under any obligation to purchase; but if he chose to do so, he was to have a right to charge the purchased premises with the amount of the purchase-money. How, then, can any one claiming

under that settlement be heard to say, that *Francis* is not to have the benefit of that charge? The settlement itself did not purport to be a dedication of the money. It left it quite untouched, it merely charged the estate. This, therefore, is an attempt to bring into the settlement property, which was never intended to be the subject of settlement. I cannot see how it can be said, that the party here is in the situation of a person claiming under the settlement, while there is an obligation to be performed.

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Two questions still remain: the first is as to the share of the granddaughter, who married. The case of *Prodgers v. Langham*(a), followed by *George v. Milbanke*(b) and subsequent cases, shews that from the moment of the settlement, such voluntary grantee is to be regarded as a purchaser, and therefore entitled to the benefit of the charge against every body.

As to the second question, which regards the lands of Bishop's Quarter, it is one of considerable importance, and I must consider it. The lease formed a part of the assets of *Francis* the elder; he by his will bequeathed it to his wife; and after her death her creditors pursued their claim against it in this Court and obtained a decree for a sale. It is now argued, that that property, being part of the assets of *Francis*, was liable on account of his breach of covenant. I apprehend there would be considerable difficulty, in a case like the present, in holding that parties may lie by until the assets are distributed, before they make any claim. The trustees, no doubt, may now be

(a) 1 Siderf. 133.

(b) 9 Ves. 190; Treat. on Vend. & Pur. vol. iii. p. 298.

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responsible with respect to the covenants entered into with Mr. *Finucane*: the right to sue is now in his personal representative; but it appears to be doubtful, whether *Finucane* was bound to bring an action. He might have taken the covenant only for his personal satisfaction, leaving it to the trustees to perform their ordinary duties.

[His Lordship having inquired who was *Finucane's* personal representative, and being informed that *William Nugent M'Namara* was, said:—]

That seems to put an end to the case. *William Nugent M'Namara* being the person to enforce the covenant, it might be well said that he was not bound to bring the action. But, besides this, he has confirmed the charge, and it would therefore seem has barred his right to seek the amount against the assets of *Francis*, the elder. I will, however, allow the Defendant's counsel an opportunity of looking into the point to see if they can answer this objection.

June 9.

On this day, Mr. Serjeant *Warren* having declined to argue the case further, His Lordship pronounced a decree for the Plaintiff in the original cause, according to the prayer of the bill, and directed the cross-bill to be dismissed without costs.

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SIR WILLIAM M'MAHON, Bart., late Master of the Rolls in Ireland, was twice married, and had living at the time of his death two sons, viz., *Beresford Burston M'Mahon* and *William J. M'Mahon*, issue of his first marriage, and six children by his second wife.

June 17.

A testator gave a surplus fund, constituted of the accumulation of certain rents issuing out of freehold and leasehold estates, to be divided in equal parts amongst all his children living at his death.

By a codicil the testator revoked the gift to W., one of the children :—

Held, that the share which had been given by the will to W., belonged to the other children, and did not devolve to the heir-at-law and next of kin of the testator.

Cresswell v. Cheslyn (2 Eden, 123), was well decided.

Sir *William M'Mahon* made his will, bearing date the 2nd of April, 1836, and, after stating certain reasons for which he did not wish his sons *Beresford* and *William J.* to enjoy his property, proceeded as follows: "It is my will, while I provide for both my said sons, and secure to the child or issue of my son *Beresford* a devolution of my general landed and other property, subject to the prior trusts, &c., hereinafter expressed, that the surplus income of the residue of my assets and property, real, personal, and mixed, after providing for the several particulars and prior charges hereinafter made, shall be equally, during the life-time of my son, *Beresford Burston M'Mahon*, divided between all my children, including the said *Beresford* and *William*, in equal shares, during the natural life of the said *Beresford*." The testator then devised and bequeathed all his property to trustees upon the trusts of his will. He then bequeathed legacies of 7000*l.* to four of the children of his second marriage, and legacies of 6000*l.* to the remaining two children of that marriage; and the testator declared that those legacies should bear interest at five per cent. from his decease; that they should be vested in his daughters at the age of twenty-one years, or upon their marriage, with the

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consent of his trustees, and in his sons at the age of twenty-five years; and certain conditions were attached to these legacies, to take effect in the event of marriage without consent by the daughters or by the sons under the age of twenty-five years.

The testator then provided for the payment of Lady *M'Mahon's* jointure, and bequeathed annuities to his sons *Beresford* and *William*, and remitted certain debts due by them to him; and after some other gifts and directions, not material in reference to the questions in this case, the will proceeded in the words following, viz. : " It is my will, that my said trustees shall, after payment, &c., apply the surplus rents and profits, interest, dividends, and income of all my property, of every kind whatever, real personal, and mixed, in and towards the payment and satisfaction of the said legacies bequeathed to my said children by my said wife *Charlotte* [testator's second wife], if my personal estate shall be deficient in any sum to pay and satisfy the same, and in augmenting the said legacies to my said daughters, *Charlotte*, *Louisa*, and *Wilhelmina*, to 10,000*l.* each, and to my said sons, *Robert*, *Augustus*, and *Charles*, to 10,000*l.* each, such increase and addition to the said legacies to be made without any calculation of interest whatever upon the said increases, to be added to the said legacies : and it is my will and direction that interest only shall be calculated on the original legacies bequeathed as aforesaid." The testator directed that these additions should be made, whether *Beresford* should be living or not ; and provided, that if the augmentations should not be effected in the life-time of *Beresford*, the tenant for life of his property should only receive 500*l.* per annum until the additions were made. The testator then provided for the

purchase of a company in the Foot Guards for his son *Beresford*: "and when the aforesaid trusts shall be realized, the said surplus fund hereinbefore mentioned I direct shall be deemed and taken to be the surplus rents, issues, and profits, dividends, interest, and income, of all my property, real, personal, and mixed, which shall remain during the life-time of my said son, *Beresford Burston M^c Mahon*, and which shall be receivable by my said trustees, after performing the aforesaid trusts. I direct that the balance of the annual surplus fund shall be ascertained each year by my trustees, during the life of my son *Beresford*, and that there shall be first deducted the sum of 1200*l.*, and the same shall be invested in Government Stock, and the dividends thereof from time to time re-invested in like stock to accumulate as a fund, during the life-time of the said *Beresford*, to purchase any eligible property which may offer in the County of Tyrone; and I direct that such property when purchased, and the said fund in the meantime, to go and pass pursuant to the limitations, &c., in the same course as the rest of my property is limited to pass under this my will from the death of the said *Beresford*. And I direct, and it is my will, that the residue of the balance, when ascertained, shall be divided in equal parts amongst all my children living at my death, including my sons *Beresford* and *William John*, &c.; and I expressly direct that such surplus fund shall only continue during the natural life of my said son *Beresford*."

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The testator then proceeded by his will to limit the estates themselves in a series of uses to take effect after the decease of his son, *Beresford Burston M^c Mahon*; and he directed, that if any of his sons should involve his family in litigation touching the validity of his

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will, every legacy and interest devised or bequeathed "to such son or sons so acting, shall in that event stand revoked, and fall into the general residue of the said trust estates and funds in the same manner as if the same had never been mentioned in this my will, and as if the son or sons so acting had died under age, unmarried, and without issue, &c. ; but I do not mean to refer to any litigation which may justly be necessary for the construction of any part of this my will, or for placing my property, or any part of it, or the rights of my minor children, under the protection of the Court of Equity."

Sir *William M'Mahon* subsequently made a codicil to his said will, bearing date the 4th of August, 1836, and thereby, after reciting his displeasure at the conduct of his son *William J. M'Mahon*, in relinquishing his profession, revoked "the other bequest and provision made for him by my said will, save the life annuity of 300*l.* per annum devised and bequeathed to him for life;" and save also the legacy of the debt due from *William* to the testator ; and the testator directed that the annuity and the remission of the debt should be subject to the condition with reference to litigation above stated.

The present suit was instituted by the trustees of the will to carry its trusts into execution, and the usual decretal order was pronounced, whereby it was referred to the Master to take the usual accounts and report generally upon the property.

On the 14th of June, 1843, the Master made his report, and thereby, amongst other matters, reported, "that according to the true construction of the said will and codi-

cil, the bequest to *William John M'Mahon* thereby revoked sank into and became part of the surplus income of the residue of the real, personal, and mixed estate of the testator, and that each of the children of the testator, except *William John M'Mahon*, was entitled to an equal seventh share of this surplus income, subject to the prior trusts of the will.

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To this report exceptions were filed by Sir *Beresford Burston M'Mahon*, insisting that the Master ought to have found that the testator had died intestate as to the property which had been given to *William John M'Mahon* by the will, and was revoked by the codicil; that *Beresford* was entitled to so much of that property as consisted of real estate, he being the testator's heir-at-law, and that so much thereof as consisted of personal estate was equally divisible amongst all the children of the testator, including *William John M'Mahon*.

An exception was also filed to the report, by three of the testator's younger children, submitting, that the Master ought to have reported that they would become entitled to interest on their additional legacies under the will from the time the same should be realized out of the accumulation directed by the will, although the time for vesting should not have then arrived.

Mr. Serjeant *Warren*, Mr. *Brooke*, and Mr. *Wall*, for Sir *Beresford B. M'Mahon*.

Argument.

The question here is, how the property, the subject of the revoked gift, is to devolve, viz. : whether it is to go to the other children of the testator, exclusive of his son *William John M'Mahon*, or to his heir-at-law and next of kin. In

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Cresswell v. Cheslyn(a) a testator gave the residue of his personal estate to his three children, share and share alike; by a codicil he revoked C., one of the children, from being one of his residuary legatees, and gave her instead a pecuniary legacy. There the Lord Chancellor said, "The testator has made no new devise by the codicil of the share which he has revoked from his daughter, and therefore the sons can have no greater interest than they had by the original will;" and accordingly he held, that this third did not belong to the two other residuary legatees, but should go according to the Statute of Distributions. This decree was afterwards affirmed in the House of Lords(b), and there can be no reason to question the correctness of the decision, although it seems to have been doubted by Mr. Serjeant Hill(c). In *Skrymsher v. Northcote*(d), Sir Thomas Plumer says, "It seems clear on the authorities, that a part of the residue of which a disposition fails, will not accrue in augmentation of the remaining parts, as a residue of residue, but, instead of resuming the nature of a residue, devolves as undisposed of"(e). *Bagwell v. Dry*(f) is to the same effect. In this case the language of the will is this: "I direct, and it is my will that the residue of the balance, when ascertained, shall be divided in equal parts amongst all my children living at my death." These words clearly created a tenancy in common, *Lashbrook v. Cock*(g). The cases, in which the revocation of a gift to one of a class has been held to accrue to the benefit of the survivors or others of that class, were cases in which

(a) 2 Eden, 123.

(b) 3 Bro. P. C. 246, Toml. ed.

(c) 2 Eden, 126. n.

(d) 1 Swanst. 566, 570.

(e) See also *Lloyd v. Lloyd*, 4Beav. 231; *Harris v. Davis*, 1 Coll. C. C. 416, 426, 427.

(f) 1 P. Wms. 700.

(g) 2 Mer. 70.

joint tenancy existed, and each individual of the class was interested in the whole fund or estate: *Davies v. Kempe*(a).

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Mr. Moore and Mr. Augustus M' Mahon for the younger children.

The question is altogether one of intention; and in this view there cannot be any doubt that it was not the intention of the testator to die intestate as to this portion of the surplus fund. The devise here is to the children, as a class, and not *nominatim*. *Beresford* and *William* are only named because they were the children of the first marriage; consequently in the event of the death of any child his share would have gone to the survivors of the class, and the other children would have taken the entire. The revocation here has exactly the same effect as the death of *William* would have had upon this surplus fund. A strong argument in favour of this construction is derived from a subsequent clause of the will, in which the testator excludes from the benefit of his will any son who should involve his family in litigation touching the validity of his will, and then directs that the interest given to such son should "in that event stand revoked and fall into the general residue." Here the Court will give to an absolute revocation the same consequential effect that the testator himself directed should follow a contingent revocation. In *Humphrey v. Tayleur*(b) a testatrix bequeathed a residue to two persons; subsequently by a codicil she revoked the gift to one; and it was held by Lord Hardwicke that the other legatee took the whole; and the principle of

(a) Carter, 2, 3.

(b) Ambl. 136.

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this decision is fully supported by subsequent cases; *Frewen v. Relfe*(a); *Knight v. Gould*(b).

Mr. Serjeant *Keatinge* and Mr. *Charles Shaw* for the Plaintiffs.

Judgment.

THE LORD CHANCELLOR :—

The case of *Cresswell v. Cheslyn*(c) was well decided; but there the gift was to the three children expressly as tenants in common and *nominalim*, and upon that ground the case has been distinguished from others. There is no doubt, however, that modern authorities have attached more weight to the circumstance of the legatees taking as a class, when the gift to any one legatee fails, than the earlier cases did. It is now settled, and, in my opinion, upon very reasonable grounds, that where there is a gift to a class, and one dies in the testator's life-time, his share will not lapse, but the whole will be divided amongst the survivors. If, therefore, I can discover in this instrument sufficient evidence of the testator's intention that the remaining children should take the share of the residue originally bequeathed to his second son, there is authority to give effect to that intention.

The testator commences by stating, that he means the residue of his estate to go equally amongst all his children; and when he comes to the actual disposition he says, the residue shall be divided in equal parts amongst all his children living at his decease, including his two sons,

(a) 2 Bro. C. C. 220.

(b) 2 Mylne & K. 295.

(c) 2 Eden, 123; 3 Bro. P. C.

246, Toml. ed.

Beresford and William John. It is manifest that he included those two sons by name, for the reason stated at the bar, viz., because they were the children of his first marriage. This, consequently, does not vary the case, and it stands as a gift of the residue to all the children after the death of the testator. He might have given the residue to all the children by name, but he does not do so, he treats them as a class. Then follows the clause, providing that in case any of his children should litigate, that is, should adversely dispute, the validity of his will, all the gifts to those parties should be null and void, and the property intended for them should go as if they had not been mentioned in the will. Now it is clear that, under this proviso, if the event happened there would have been revocation of the gifts to the children so acting, and no portion of the residue would have been undisposed of, but the whole would have gone to the other residuary legatees.

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Then comes the codicil, in which the testator, after expressing his disapprobation of the conduct of his second son, says, I hereby revoke the other bequest and provision made for him by my said will, save the life annuity of £100. per annum bequeathed to him for life, and save also the legacy to him of the debt due by him to me. And I direct that the said annuity and legacy of the said debt due by him are subject to be annulled and revoked in manner provided by my will, in case he shall involve my wife, *Charlotte*, or any of his brothers or sisters, in litigation; and in such event I hereby revoke and annul the devise and bequest of the said annuity and the said debt so due by him. Here again I find the testator acting upon the clause in his will relative to litigation of his

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will, leaving no doubt as to his meaning; and no person can dispute, that if the second son, having taken the substituted portion provided for him by the codicil, were to do the act intended to be guarded against, the effect would be a revocation of this interest and an entire exclusion from all benefit under either instrument. Had the testator then a different intention, as to the larger provision, in the event upon which the condition of forfeiture was imposed? A large provision is made in his will by a parent for his child, subject to a certain clause of forfeiture; by his codicil he revokes that large provision, substitutes for it a smaller gift, and says that the latter gift is to be subject to the same condition. Under the will, in the event of a forfeiture taking place, the gifts so forfeited, and amongst them the share of the residue, would go to the other children. Can I then construe differently the substituted gift? The effect of such a construction, as far as relates to the personal estate, would be, that *Beresford*, as one of the next of kin would take a portion of it, and not only *Beresford*, but also *William*, the very son whom he intended to exclude from all interest except the 300*l.* per annum. This clearly was not his intention, and there is no rule of law which compels me to adopt this construction. On the contrary, the authorities are in favour of the opposite construction. The gift is to a class, and the time of the death of the testator is the period when the objects included in that class are to be ascertained, and at that time *William* is excluded by the codicil. I am clearly of opinion that I disturb no rule of law, and give effect to the plain intention of the testator, in deciding, that *William* is excluded from any share of the residue, the whole of which must go to the other residuary legatees.

Let the exception be overruled, without costs, as this is an amicable suit.

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The exception filed on the part of the younger children was not argued, and was overruled.

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June 1.

BY indenture bearing date the 21st of November, 1801, and made between *Patrick Richard Blackwood Brady* of the first part; *Mary Blackwood*, widow, the mother of

In the year 1801, on the occasion of the marriage of *A.*, who was an infant, with *B.*, articles were executed,

whereby it was provided, that certain estates, situate in England, to which *A.*, in common with her sisters, was entitled in remainder expectant upon the decease of her father, *M.*, who was tenant for life thereof, should, upon *A.*'s attaining her full age, be conveyed unto *N.* and *O.* upon trust for the husband and wife, and the younger children of the marriage; and by those articles it was provided that the trustees should have power, with the consent of *A.* and *B.*, "to sell the whole or any part of the said lands of *A.*," and invest the produce in land or Government securities upon the trusts therein specified. In 1804, upon *A.*'s attaining her full age, a settlement was executed according to the provisions of the articles: and the power of sale herein contained authorized the trustees to sell, with the consent of *A.* and *B.*, "the whole or any part of the said *A.*'s estate and interest" in the said lands: and *B.* covenanted that he and his wife *A.* would levy a fine to enure to the uses of the settlement.

In the year 1812, the estates in question, as well the remainder, as the tenancy for life, were sold, the tenant for life consenting to receive a proportion of the purchase-money equivalent in value to his life estate, according to the calculation of a notary. The sale was had without the intervention of the trustees, though with the full knowledge of one of them, *N.*, as it was alleged: and of the share of the produce to which *A.* was entitled, a sum amounting to 633*l.* was subsequently laid out in personal securities.

In the year 1839, after the death of *N.*, upon a treaty between *O.*, the surviving trustee, and *A.* and *B.* and the Plaintiff, who was the only younger child of the marriage, the Plaintiff, and *A.* and *B.*, for valuable consideration released *N.* from all claim and responsibility in respect of the trusts of the articles and settlement, and *N.* assigned to a new trustee for said parties the securities upon which the trust funds had been invested.

On a bill subsequently filed by the Plaintiff against *O.* and the personal representative of *N.* and others:—*Held*, that there was no breach of trust committed by the exercise of the power of sale in the life-time of the tenant for life, inasmuch as, upon the true construction of that power, such an immediate sale of the estate in remainder was fully warranted.

The sale in question ought to have been conducted by the trustees; but after so great a lapse of time, and there being no suggestion that the sale had been made at an undervalue, or that the produce was not forthcoming:—*Held*, that the bill could not be supported.

Generally speaking, where a sale has been made without the concurrence of the trustees, if the sale was a proper one, and the trustees have adopted it, the Court will carry it into execution.

Held, also, that the deed of release of 1839, to the trustee *O.*, operated as a release to the personal representative of the deceased trustee, *N.*, such deed amounting in fact to an acceptance by the Plaintiff of the several securities, upon which the purchase-money had been invested

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the said *Patrick Richard Blackwood Brady*, of the second part ; *Samuel Madden* and *Catherine Madden*, his daughter, of the third part ; the Rev. *Dudley Charles Ryder*, the grandfather of the said *Catherine Madden*, of the fourth part ; and *James Blackwood* and *Charles Powell Leslie* of the fifth part ; being the marriage articles executed upon the occasion of the marriage of *Patrick Richard Blackwood Brady* and *Catherine Madden* ; after reciting (*inter alia*), that the said *Catherine Madden* was seised in her own right of certain lands in the county of Leicester, in the kingdom of England, it was witnessed, that when and so soon as the said *Catherine Madden* should attain her full age of twenty-one years, she would well and sufficiently convey and assure unto the said *James Blackwood* and *Charles Powell Leslie*, their heirs and assigns, all her estate and interest, of every nature and kind soever, in the said lands situate in the county of Leicester, or elsewhere in Great Britain, upon the trusts and to and for the intents and purposes therein-after expressed and declared ; that is to say, in trust for the said *Catherine Madden* and her assigns, for and during her natural life ; and immediately after her death upon trust for the said *Patrick Richard Blackwood Brady* and his assigns, for and during his natural life, if he should survive the said *Catherine Madden* ; and from and immediately after the death of the survivor of them in trust for the younger children of the said intended marriage, whether sons or daughters, and their respective heirs, equally to be divided amongst them if more than one : and it was by the said deed declared, that in case any of such younger children should die under the age of twenty-one years, without leaving issue living at their respective deaths, or

which should be born in due time after ; or if any of such younger children should become an eldest son, before he should become entitled to his proportion of the said lands in possession, in such case the share of such younger child or children so dying or becoming an eldest son, should go and belong to the survivor or other younger child or children, and his, her, or their heirs : and in case there should not be any younger child of the said marriage, which should attain the age of twenty-one years, then that said lands should revert to the use of said *Catherine Madden* and her heirs for ever. The articles then contained a covenant on the part of *Dudley Charles Ryder* and *Samuel Madden*, that they would at all times do and execute all acts, deeds, and conveyances requisite for effectually vesting the said lands in the said *James Blackwood* and *Charles Powell Leslie*, for the purposes therein mentioned, so as, however, not to injure, prejudice, or affect any estate or interest, which the said *Dudley Charles Ryder* and *Samuel Madden* (who were successive tenants for life) had in the said lands or any part thereof.

The deed then contained a power of sale, which was in the following terms : “ Provided always, and it is declared and agreed by all the parties to these presents, that it shall and may be lawful to and for the said *James Blackwood* and *Charles Powell Leslie*, by and with the consent of the said *Patrick Richard Blackwood Brady* and *Catherine Madden*, his intended wife, under their hands and seals, for that purpose had and obtained, to sell the whole or any part of the said lands, tenements, hereditaments, and premises of the said *Catherine Madden*, in Great Britain, and lay out the money to arise from such sale or sales, in the purchase of lands in fee simple in Ireland, or

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in Government securities, at the election of the said *Patrick Richard Blackwood Brady* and *Catherine Madden*, or the survivor, and which purchased lands, or money to be so lent on Government securities, are to be subject to the same trusts, and go and be paid to such person and persons as are hereinbefore mentioned and specified with respect to the lands, tenements, hereditaments, and premises in Great Britain, in case the same had not been sold, and such securities, if taken, to be deemed and considered as land and go accordingly."

Immediately upon the execution of the deed the marriage was solemnized, and there was issue thereof two children, a son and daughter; the latter of whom, *Catherine*, was the Plaintiff in the present cause. *Catherine Blackwood Brady*, the Plaintiff's mother, having attained her age of twenty-one years, and her grandfather, *Dudley Charles Ryder*, having died in the meantime, a settlement was executed pursuant to the provisions of the articles of the 4th of November, 1801. This deed, which bore date the 20th of November, 1804, was made between *Patrick Richard Blackwood Brady* and *Catherine* his wife of the first part, the said *Mary Blackwood* of the second part, *Samuel Madden* of the third part, and *James Blackwood* and *Charles Powell Leslie* of the fourth part: and after reciting the articles of November, 1801, and the said marriage, and that *Catherine Blackwood Brady* had attained her age of twenty-one years, and that she was entitled to one-fourth of the manor of Newton Nethercot, in the county of Leicester, and also to one-fifth of an undivided moiety of the manor of Snareston in the said county, the said deed witnessed, that in execution of the said articles, and for assuring and conveying the said lands and pre-

leases upon the trusts thereafter contained, they, the said *Samuel Madden* and *Catherine Blackwood Brady*, by and with the consent of her husband, released the said lands and premises to *James Blackwood* and *Charles Powell Leslie*, their heirs, &c., upon trust, as to Snareston, to the use of *Samuel Madden* for his life, and from and after his decease, as to said lands of Snareston, and from the date of the settlement as to the other lands, upon the same trusts, and to and for the like uses declared by the articles of the 21st of November, 1801.

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The deed then contained a power authorizing "*Samuel Madden* and the said *Catherine Blackwood Brady*, and the said *Patrick Richard Brady*, her husband, respectively, when and as they shall be respectively in the actual possession of the said messuages, lands," &c., to make leases for one, two, or three lives in being, or for any term not exceeding thirty-one years, to take effect in possession, and at the best and most improved yearly rent. Then followed a power of sale to the trustees, *James Blackwood* and *Charles Powell Leslie*, by and with the consent of the said *Patrick Richard Blackwood Brady* and *Catherine* his wife, or the survivors of them, under his hand or their hands and seals, "to sell the whole or any part of the said *Catherine's* estate and interest in the said manors or tenements, cottages, lands, tenements, and hereditaments, situate in the county of Leicester aforesaid." In every other respect this power corresponded with the power of sale contained in the articles of November, 1801, already stated. The deed further contained a covenant on the part of *Samuel Madden*, and *Brady*, for himself and his wife, to levy fines to enure to the uses of the settlement, and for the trusts therein expressed.

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Catherine Blackwood Brady had three sisters and one brother, who were each entitled to corresponding shares in the said Leicestershire estates. One of the sisters, *Charlotte*, had intermarried with Mr. *Robert Borrowes* (one of the Defendants in this cause), an Irish solicitor, and upon the occasion of her marriage, her share was vested in trustees, one of whom was the said *Charles Powell Leslie*, upon certain trusts for the issue of the marriage, with a life estate therein to the said *Robert Borrowes*.

In the year 1812, a treaty was set on foot for the sale of the Leicestershire estates, all of which were sold in that or the following year, for the sum of 32,167*l.*, the tenant for life of Snareston having concurred therein, and his life interest being valued by Mr. *Morgan*, an actuary, at 5059*l.* It was represented that Mr. *Borrowes* had taken the principal part in the conduct and management of this sale; that he had acted as the solicitor of the several parties interested, and had instructed the English solicitors who were employed upon the occasion; that the trustees were never consulted as to the propriety of the sales; and that in fact none of the parties interested had given any directions respecting the sales except *Borrowes*. The share of the purchase-money, to which the parties claiming under the articles and settlement of 1804 were entitled, came to the hands of *Borrowes*, and he, in the year 1814, lent thereout a sum of 3000*l.*, late Irish currency, to Mr. *Robert La Touche*, upon the security of a bond with warrant of attorney collateral therewith, executed to the trustees, *Blackwood* and *Leslie*, in whose names judgment was entered in the year 1819. Mr. *Borrowes* also lent out of the said proportion of the purchase-money to *Patrick Richard Blackwood Brady*, the Plaintiff's father, a sum

of 3332*l.* Irish currency, upon the security of a bond and warrant, and the assignment of a policy of insurance which had been effected with the Equitable Assurance Office, for the sum of 3000*l.*; the premium upon the latter sum was paid out of the interest accruing from the loan to Mr. *Robert La Touche*.

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In the year 1830, *Charles Powell Leslie* died, having appointed *Christiana Leslie*, his widow and one of the Defendants in this cause, his executrix. In the beginning of the year 1838, *James Blackwood*, who up to that time, as it appeared, had never taken any part in the management of the trusts of the settlement, became acquainted with the manner in which the two sums of 3000*l.* and 3332*l.* had been laid out; and *Blackwood* being himself a creditor of *Brady*, upon foot of two judgments obtained by him against *Brady* in Michaelmas Term, 1832, and having instituted proceedings thereon, obtained a receiver over the rents of the life estate of *Patrick Richard Blackwood Brady*. In this state of circumstances all parties, including Mr. *Borrowes*, being under the impression that *Catherine Blackwood Brady*, the Plaintiff's mother, was, under the articles of 1801, and settlement of 1804, entitled to a separate use for life in the funds purchased by the sales of the English estates, a case on behalf of *Catherine Blackwood Brady*, prepared by her then solicitor, Mr. *Hall*, with the assistance of *Borrowes*, and corrected by him, was laid before Mr. *Blackburne*, the present Master of the Rolls. The first question in this case, which was added by *Borrowes* himself, was as follows: "Counsel is requested to point out to Mrs. *Blackwood* the course she should adopt to obtain the full annual income of that part of her property settled to her separate use by the articles of the 20th of November, 1801,

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and the settlement of the 20th of November, 1804, namely, the interest in the sum of 6,392*l.*, for which part of the English estates were sold," and to point out any funds applicable to the payment of the premium on the policy of insurance effected with the Equitable Assurance Company on the life of *Brady*, and whether the claim of *James Blackwood*, on foot of his judgments, could be resisted and if so, the course that should be taken. From the opinion of Mr. *Blackburne* it then appeared that *Catherine Blackwood Brady* was not entitled to a separate estate in the funds, which were the subject of the articles and settlement of 1804. Subsequently to this a treaty was set on foot and a long correspondence, which terminated in a deed on the 15th of July, 1839. This deed, which was made between *James Blackwood* of the first part, *Patrick Richard Blackwood Brady* and *Catherine* his wife, of the second part, *Catherine Blackwood* of the third part, and the Rev. *Silver Oliver* of the fourth part: after reciting the articles of the 21st of November, 1801, and the settlement of the 20th of November, 1804, and the sales of the English estates, and the loans to *La Touche* and *Brady*; that the said *Catherine Blackwood* had attained her majority in the year 1837; that *Leslie* was dead, and that *James Blackwood* was the surviving trustee of the said settlement; that the said *James Blackwood* had, in Michaelmas Term, 1832, obtained two judgments against the said *Patrick Richard Blackwood Brady*, upon which there was then due and owing the sum of 1885*l.* 19*s.* 6*d.*; and reciting further, that it had been agreed, for the purpose of settling all disputes between the parties, that *James Blackwood* should assign to *Silver Oliver* all the trust premises, and the several trusts vested in him by the articles of November, 1801, and the settlement of November, 1804; and should release

Patrick Richard Blackwood Brady from the said sum of 1885*l.* 19*s.* 6*d.* in consideration of the sum of 300*l.*, to be paid to him by the said *Brady*, and also in consideration of being released from all responsibility arising from the said trust premises; and reciting further, that said sum of 300*l.* had been paid to *James Blackwood* in satisfaction of said sum of 1885*l.* 19*s.* 6*d.*, and that the said judgments so obtained as aforesaid by *James Blackwood*, and all claims thereon, had ceased and determined: said deed witnessed, that in pursuance of said agreements, the said *James Blackwood*, with the assent, and by the desire of the said *Patrick Richard Blackwood Brady* and *Catherine* his wife, and of the said *Catherine Blackwood*, assigned unto the said *Silver Oliver* the said trust premises, so vested in him, as surviving trustee as aforesaid, and the aforesaid judgments so obtained against the said *Robert La Touche* and *Patrick Richard Blackwood Brady*, and the said policy of insurance, to hold the same upon the trusts of the articles and settlement, or such of them as still remained subsisting; and the said *Patrick Richard Blackwood Brady* and *Catherine* his wife, and the said *Catherine Blackwood*, did thereby release and for ever discharge the said *James Blackwood* of, from, and against all actions, claims, and demands, which they or any of them could have against him, for or on account of any matter, cause, or thing whatsoever in any manner relative to the trusts before mentioned, or to the trust premises in him vested, or any investment or disposition thereof made by him or with his assent; and the said *Patrick Richard Blackwood Brady* and *Catherine* his wife, and the said *Catherine Blackwood*, did thereby for ever discharge the said *James Blackwood* from his office of trustee, and from all liability to act further therein; and did thereby covenant to indemnify *James Blackwood* from all liability by reason of his having ac-

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cepted the office of trustee under the said deed, or having done any act theretofore in relation to the said trust premises.

On the 29th of September, 1841, the Plaintiff, *Catherine Brady*, filed the bill in the present cause against the said *Robert Borrowes*, *James Blackwood*, *Christiana Powell Leslie*, the executrix of *Charles Powell Leslie*, *Patrick Richard Blackwood Brady*, and *Catherine*, his wife, and the *Rev. Silver Oliver*; and thereby, after setting forth the deeds of November, 1801, and November, 1804, and the sales of the English estates, and the relationship and character filled by *Borrowes*, she charged that the proposal for the sales had originated with *Borrowes*, by whom those sales were subsequently and exclusively conducted: that the trustees, *Leslie* or *Blackwood*, were never consulted as to the propriety of those sales, nor was there even any notice taken of their rights: that they were not made parties to the conveyances to the purchasers, nor was there any notice given to such purchasers of the existence of the articles or settlement; but that on the contrary all the information was concealed by *Borrowes*, for the purpose, as the bill charged, of enabling him to acquire and obtain the absolute power and dominion over the share of the purchase-money, to which he was himself entitled in right of his wife.

The bill further charged, that the amount of the share of the produce of the sales, to which the Plaintiff was entitled, was received by *Borrowes*, without any authority from the trustees, *Leslie* and *Blackwood*; and that same was lent out by *Borrowes* alone, in the manner already

stated, in violation of the trusts of the settlement; that the securities taken were altogether insufficient: that *Robert La Touche*, to whom 3000*l.* had been advanced, had but a life estate in his property; and that *Patrick Richard Blackwood Brady*, to whom 3332*l.* was lent, was also strict tenant for life of all his estates, and was in very embarrassed circumstances; and that *Borrowes* had not, for more than six years after the date of the bond executed by *Brady*, procured judgment to be entered thereon, although said bond continued to be in the possession of *Borrowes*. The Plaintiff by her bill further charged that *Borrowes*, beside acting as the solicitor and adviser of all parties in the business of the sales, and in the receipt of the purchase-money, was the solicitor who transacted the loans and prepared the bonds, and was the attorney upon record of the said judgments against *Brady* and *La Touche*: that at all times *Catherine Blackwood Brady* acted under his sole guidance and direction; that the Plaintiff likewise, from the time she was capable of understanding matters of business, consulted him as her relative and the person in whom she had the greatest confidence; and that, under all these circumstances and, particularly considering that *Borrowes* had received the trust monies upon his own responsibility, and had permitted the said properties to be sold without the authority of the trustees, that he had invested himself with the character of a trustee, and had become liable and answerable to the Plaintiff for the application thereof.

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The Plaintiff by her bill also stated that up to the month of December, 1839, she was in total ignorance that the said lands were sold for any greater sum than the sum of 6332*l.*, or that any part of the purchase-money was paid

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to the tenant for life, *Madden*: and she charged that such tenant for life ought to have been paid the annual produce, or amount of the purchase-money, during his life, but was not entitled to be paid any sum for the purchase of his life interest; and that if he had declined to join in such sales, unless he was paid out of the produce, *Borrowes*, acting as such trustees, ought, according to the true intent and meaning of the settlement, to have refused to sell the said estates: and she submitted that if *Borrowes* had so applied any portion of the purchase-money, he was bound to make good the same: she further charged that the value set upon the life estate of *Madden* was most exorbitant; that at the period when the sales were had, he was of the age of fifty-seven years, and affected in health from dangerous illness, which in about twelve months afterwards caused his death.

The bill further stated, that no fine was ever levied in pursuance of the covenant in the deed of the 20th of November, 1804: whereby and by reason of the concealment from the several purchasers of the fact of such settlement having been executed, she was advised, she was barred from any relief against such purchasers, who bought said lands without notice of the Plaintiff's rights under the articles of November, 1801, and the settlement of November, 1804. With respect to the deed of the 15th of July, 1839, the Plaintiff by her bill stated that she had, under the guidance and advice of *Borrowes*, executed some deed on the subject of said trust property, and appointed a trustee in the room of *James Blackwood*; but that the contents and meaning thereof were unknown to her: that *Borrowes* represented to her that the said lands had been sold by the trustees, and that

they had received and applied the purchase-money : and she charged that she had executed the said deed in total ignorance of the facts under which the sales had been made, and under the impression that the representations so made by *Borrowes* were true.

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The bill prayed that the trusts of the articles of the 21st of November, 1801, and the settlement of the 24th of November, 1804, might be carried into execution : that an account might be directed of the produce of the sales, and of the share to which the Plaintiff became entitled to have laid out in pursuance of the trusts of the articles and settlement, and how and in what manner same was applied : and that the Defendants, *Borrowes*, *James Blackwood*, and *Christiana Leslie*, or such of them as the Court should think fit, should be declared responsible for all such portions of the purchase-money which they should appear to have received : and that the said Defendants, or such of them as should be found liable, should be ordered to bring in and invest in Government Stock all such sums as the Master should report to have been received by them : and that same might be applied according to the trusts of the articles and settlement. The bill then prayed an account of the personal estate of *Charles Powell Leslie*, in case the said *Christiana Powell Leslie* should not admit assets to answer what such estate should be found responsible for, and concluded by asking for a declaration, that the Plaintiff ought not to be bound by the indenture, so as aforesaid executed in the year 1839, and that same might be declared fraudulent and void, so far as same respected the rights of the Plaintiff in the present suit, or so far as the Court should think fit to direct.

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The Defendant, *Robert Borrowes*, by his answer, admitted that the sales of the English estates as charged the bill, had taken place in the year 1812: but positively denied that the proposition for such sales had originated with him, or that he had acted as the solicitor or the party principally active in effecting such sales: that English solicitors, Messrs. *Eborall* and *Baxter*, who had been the English solicitors of *Charles Powell Leslie*, and who were first suggested by the Defendant, *Patrick Richard Blackwood Brady*, and were subsequently approved of by all the parties interested, acted throughout the whole business as the general solicitors for all parties. He admitted that he was materially interested in the transaction, as that as he was the near connexion of the parties, and the only member of the family resident in Ireland who had any knowledge on the subject, he had, in consequence of the repeated solicitations of the several parties, throughout the sale, given every aid and assistance in his power to bring the said estates to sale to the best advantage: that in so doing he acted with the full knowledge and concurrence of *Charles Powell Leslie*, whose private agent he was and who, besides the interest he had therein, as trustee under the articles and settlement of November, 180 was especially acquainted with the value of the estates in question, having married *Anne Ryder*, one of the daughters of *Dudley Charles Ryder*, and sister of the wife *Samuel Madden*, and having thereby become entitled to her right to an undivided moiety of said estates, part of which he had actually sold, shortly prior to the year 1812. The Defendant positively stated that he had never acted in any other capacity, with respect to the different parties entitled to shares of the said property, than that of a friend, having never claimed or received a

fee or remuneration from said parties, or any of them, for his time or trouble, save that he charged for some copies of deeds connected with the title, which were furnished to the English solicitors.

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The Defendant admitted that he never consulted or informed the Defendant, *James Blackwood*, on the subject of the sales; but he alleged that from time to time he communicated everything that had occurred in the transaction to *Leslie*; and as evidence that *Leslie* was fully aware, and approved of the sales, he had himself bid at the auction for one of the lots, but was overbid; and that subsequently *Leslie* had executed to each of the purchasers deeds of conveyance for the production of certain of the title deeds, then in his possession. The Defendant admitted, that he had not given to the purchasers of the property in question any intimation of the articles of 1801, or the settlement of 1804, never having held any direct communication with them; that it was true the trustees were not made parties in the conveyances to the purchasers, or their rights taken any notice of; but he alleged that he had never seen any drafts of such conveyances, nor were any such laid before him for approval. He further stated that he informed the English solicitors of the fact of such settlement and articles, and that *Leslie* and *Blackwood* were the trustees of the portion to which the Defendant, *Catherine Blackwood Brody*, was entitled: he stated that he had never even seen the abstract of title to the property in question, which was altogether prepared in England, and laid before Mr. *Charles Butler* on the part of the purchasers: and he submitted, that he was not in any manner accountable for the omission or mistake which had occurred in relation to the said trustees.

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With respect to the life estate of *Samuel Madden*, the Defendant *Borrowes*, by his answer, alleged, that in the month of January, 1812, previous to the sales in question, *Samuel Madden* had assigned his life interest in the whole of his estates in England, to his son, *John Madden*; but it being held important for the interests of all parties to give the purchasers thereof the actual possession of the estates, *Madden* was applied to, with the consent of all parties, and in particular under the advice of *Charles Powell Leslie*, and he consented to join therein upon the condition that he should receive out of the purchase-money the value of his interest in the said estates: that it was subsequently agreed that the value should be submitted to the decision of Mr. *William Morgan*, the eminent actuary of the Equitable Assurance Company, by whom the value was ascertained to be a sum of 5050*l*. The Defendant, *Borrowes*, by his answer, further admitted that the share of the purchase-money which belonged to *Patrick Richard Blackwood Brady*, and *Catherine*, his wife, and which the Defendant represented to be different from that stated in the bill (in a very unimportant amount, however), had been received by him, but upon the authority, as he alleged, of the said *Charles Powell Leslie*. He further admitted, that he was the party who had been instrumental in effecting the loans to Mr. *La Touche* and *Brady*; but he stated that both of said loans were made with the knowledge, and by the desire of, *Leslie*, and upon the assurance of the said *Patrick Richard Blackwood Brady* himself, that both the sales of the estates, and the application of the purchase-moneys, had the full approbation and concurrence of *James Blackwood*. With regard to the sufficiency of the security of Mr. *La Touche*, the Defendant stated that he was, at the

time of the loan, tenant in fee simple of property producing several thousand pounds per annum; and that with respect to the loan to *Patrick Richard Blackwood Brady*, it was collaterally secured by a policy of insurance, the value of which, as appearing from the tables published every ten years by the Equitable Assurance Company, was, on the 1st of January, 1840, worth a sum of 7080*l.*, and if now surrendered to the Company, would produce a sum of 4266*l.* And the Defendant offered, by his answer, to pay into Court, to the credit of the cause, the whole amount of the sums so invested, upon getting a valid assignment of the said several securities and policy of insurance.

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The Defendant, *Borrowes*, by his answer, denied that the Plaintiff had been always, or at all, in the habit of asking his advice in matters of business; that, on the contrary, until the latter part of the year 1838, she had never in any manner consulted him; that some difficulty having occurred as to the application of the interest from *La Touche's* bond, which had been the fund always set apart for the payment of the premium upon the insurance, he recommended her to be guided by the advice of counsel, which afterwards led to the case laid before Mr. *Blackburne*; that, subsequently, the solicitor for the Plaintiff, and also for her mother, called upon him with a further opinion, advising a deed to be executed, assigning Plaintiff's trust funds to a trustee for the separate use of the said *Catherine*; that such deed (the deed of the 15th of July, 1839, the provisions of which have been already particularly detailed), was settled by Mr. *Blackburne*; but the Defendant alleged that he did not in any manner interfere in the preparation thereof; nor did he

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ever read any draft of same, or see the engrossment thereof until after its actual execution. The Defendant, *Borrowes*, by his answer, further set forth two letters addressed to him by the Plaintiff; the first of the 9th of September, 1839, and the second of the 18th of the same month (which will be found hereafter), and submitted that it appeared from said letters that she, at that time, fully understood her rights, and distinctly recognized and adopted the very securities, which she by the present bill sought to repudiate. The Defendant denied that he had invested himself with the character of a trustee, or had become in any manner answerable to the Plaintiff.

The Defendant, *Christiana Powell Leslie*, the executrix of *Charles Powell Leslie*, by her answer stated that, from all she had ever heard, and according to the best of her knowledge, *Leslie*, though aware that the sale was about to take place, never actually interfered in the business of the sale, or was consulted thereon; that *Borrowes*, who was a person of high character and professional skill, and from the close connexion that subsisted between him and the other members of the family, and the interest he had in the property, was the person naturally to be employed in the management of such business, did, in fact, not only conduct the whole transaction, but also acted in all matters connected with the trusts, on his own responsibility; that he was the solicitor and private agent of *Charles Powell Leslie*, and one in whom all parties reposed the greatest confidence; and as evidence that *Leslie* had never in any manner joined in the sale, she relied upon the fact that neither *Leslie* nor his co-trustee, *James Blackwood*, were made parties in the conveyances to the purchasers; and the share of the purchase-money, to which

Patrick Richard Blackwood Brady, and *Catherine*, his wife, were entitled, was paid to the sole credit of *Borrowes*, into the hands of Messrs. *Bell* and *Higginson*, London merchants, the near connexions of *Borrowes*, and who were never the bankers or agents of *Leslie*. The Defendant, *Christiana Powell Leslie*, further stated, that the sale, which was one for the advantage of all parties, was a perfectly fair transaction, and made at the full value. The Defendant then stated particularly the manner, in which the portion of the purchase-money, to which the Plaintiff and her parents were entitled, had been lent, and submitted that, looking at the characters filled by *Borrowes*, both as the confidential solicitor of *Charles Powell Leslie*, and the person by whom the matters of the trust were administered, it was the duty of *Borrowes* to have taken care that no responsibility should rest upon *Leslie*. The Defendant, *Christiana Powell Leslie*, then referred to the deed of the 15th of July, 1839, which, she submitted, was a fair settlement of family matters, deliberately entered into by the Plaintiff; that, at the time of the execution of said deed, it was not considered that *Leslie* had incurred any liability, and she submitted that she was entitled to rely upon the release to the co-trustee, *James Blackwood*, which was contained in the deed, as a bar to the present suit.

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The Defendant, *James Blackwood*, by his answer alleged that he had never been consulted upon the subject of the sales in question, nor had he ever in any manner interfered in relation to the trusts of the articles of November, 1801, or the settlement of November, 1804: that his attention had never been called to the disposal or investment of the trust funds, until some time in the latter end

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of the year 1837, when, in consequence of the proceedings which he was then instituting upon foot of two judgments against *Patrick Richard Blackwood Brady*, he was by a letter addressed to him by the Defendant, *Catherine Blackwood Brady*, required to stop his proceedings and fulfil the trusts of the settlement of November, 1804 : that a long correspondence and negotiation resulted therefrom between his solicitor and those concerned for *Catherine Blackwood Brady*, which terminated in the deed of the 15th of July, 1839 : that though he had never acted in the trust, or been consulted in relation thereto, yet in order to relieve himself from all litigation and trouble, he had agreed to give up a sum of about 1500*l.* due to him by the Plaintiff's father. He further stated, that the Plaintiff at this time was of full age, and was perfectly aware of all her rights : that she was not in any manner under the influence of the Defendant, and acted chiefly through the instrumentality of her present solicitor : and he relied upon the deed as a full and effectual bar to the present suit.

The two letters of the Plaintiff, addressed to the Defendant, *Borrowes*, and referred to in the foregoing statement, are as follows :

“ 48, *Upper Crescent, Clifton, September 9th, 1839.*

“ MY DEAR UNCLE,—As the enclosed letter relates to a proposed transaction in which my personal interest may be materially involved, I do not hesitate in again seeking your advice and assistance to guide my decision. Mr. *Jackson* will explain, if you are kind enough to read his communication ; and I think he offers a very clear and

my settlement, but whether it may be prudent for me to take such a step I am not competent to judge. No one, should think, but Mr. *Blackburne*, can be relied on, to pronounce from his knowledge of late of our affairs, in particular, whether my father and brother could give me good security at the wrong end of a mortgage of 2000*l.*, and if so, of what the security ought to consist: this is what I again venture to ask of you to ascertain for me. While I entertain all reasonable confidence in Mr. *Jackson*, I am not disposed to adopt such a strong measure solely on his suggestion, and without your advice and approbation. Should you think it desirable, I will at any moment return to Dublin; but I should still have to seek your kind intervention to reach Mr. *Blackburne*. If, without any risk to myself, I could facilitate this pacification, it would give me much satisfaction to do so; and if some remains are not forthcoming from the estate to maintain my father and *Richard*, we shall never have any peace with the little which is left for Mamma and I; but, on the other hand, 4,000*l.* is too much for me to sacrifice. I have relied to Mr. *Jackson*, that I refer the matter to yourself and Mr. *Blackburne*. May I hope, my dear uncle, for your indulgence and advice in such an urgent matter? I have also made it an absolute condition, in case of being advised to comply, that my father should give up to me the whole of my mother's property, in case her demise should precede his."

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"48, *Upper Crescent, Clifton, September 18th, 1839.*

"MY DEAR UNCLE,—I thank you for your kind and satisfactory letter; indeed, before it arrived, I had on reflection come to much the same conclusion. I enclose

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another, received same time, from Mr. *Jackson*; it contains nothing new, but shews the urgency of the case. I feel that I am in a very distressing position, and am equally desirous to avoid being on the one hand selfish, and, on the other, making a fool of myself: I have therefore come to the following conclusion, as a medium, and the very last concession I can make: I therefore propose, if it can be of any use, to give up altogether, and for ever, 1000*£* — provided I am no farther pressed on the subject, and on condition still of my father resigning to me my mother's property, in case he survive her; my fortune will then stand thus:

Hilton,	3,000 <i>£</i> .
Clonee,	3,000
Mr. <i>La Touche</i> ,	3,000
Equitable Policy,	3,000

12,000*£*.

Part of this is late currency, and I reckon that what remains in Leicestershire will about make it British. If you approve of this, I wish it settled at once; the condition affixed is of much importance to me: pray give me your advice on this. I have written to the same effect to Mr. *Jackson*, contingently, however, on your sanction. I hope, my dear uncle, you will for my sake pardon this further intrusion. By this plan I should have no uncertainty; the remaining 3000*£*. would be, as now, the first charge on the property: I do think the certainty of independence is an equivalent for the sum given; I know you will take this into account for me. Supposing my present offer to be accepted, and the proposed premium saved, Mrs. *Anne B.*'s annuity might perhaps be continued to her instead

of paying her off, and thus give another chance in that quarter."

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Argument.

Mr. Serjeant *Keatinge*, Mr. *Moore*, and Mr. *Brereton*,
for the Plaintiff.

The power of sale in this case did not authorize a sale during the life of the tenant for life. Such a sale, it is obvious, must always be made at a great sacrifice; and generally speaking, it is not possible to suppose, that the parties could have been the intention of the parties thus to have accelerated the life estate at the expense of the residue. *Fry v. Fish*(a) and *Fox v. Prickwood*(b) will probably both be cited at the other side, to prove that the power was well executed: but these cases do not establish the proposition. They only prove, as your Lordship has accurately and clearly expressed it in the *Treatise of Powers*(c), "that although the power is vested in a tenant in remainder, yet if, from the intention expressed or implied, its immediate execution is not restrained, it will over-reach the estates in the settlement prior to that of the donee of the power;" and in the former case, *Fry v. Fish*, in point of fact, the power of sale over-rode the estate of the tenant for life. But is there anything in the instruments now before the Court, to indicate any such intention? None such is expressed, and there is much to shew that none such was ever intended. In the articles, when the father and grandfather of the lady are made to covenant that they will do all acts requisite for effectually vesting the estates in the trustees for the pur-

(a) *Treatise of Powers*, vol. ii. (c) Vol. ii. p. 38.
488.

(b) 2 Bulsts. 219; Cro. Jac. 347.

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poses of the settlement, it is added, "but so as not to injure, prejudice, or affect any estate or interest," that they then had in the said lands. Again, the power in terms was to sell the whole of the lands, manifestly shewing that it was a sale of the whole fee, and not of a mere remainder, which the parties contemplated. But even assuming that the power was capable of being exercised during the existence of the previous estate, the trustees ought to have concurred. The *cestui que trusts* were entitled to have had the benefit of the advice and discretion of both trustees; and these trustees, or the Defendant, *Borrowes*, who acted as their substitute, and by whose interference and agency the whole affairs of the trust estates were conducted, must be held answerable for the consequences. With regard to the release of July, 1839, to *James Blackwood*, it cannot be held to operate as a release to *Charles P. Leslie* or his assets: his personal representative (for, when the deed was executed, *Leslie* was himself dead) was not a party to the deed, and the parties never intended to release the estate of *Leslie*. *Payler v. Homersham*(a) shews that general words in a release are qualified by the recitals: and it is equally settled, that a release shall only bind the releasor, so far as he was acquainted with the facts and the effect of the release. The Plaintiff here was at liberty to proceed against the estate of *Leslie* alone, *Walker v. Symonds*(b), or against *Borrowes*, who, in point of fact, has by his conduct rendered himself a trustee: *Borrowes* was the person to whom the produce of the sales was paid, and by whom that produce was laid out upon securities, which were clearly out of the scope of the trust. It cannot avail the personal represen-

(a) 4 Maule & S. 423.

(b) 3 Swanst. 1.

tative of *Leslie* to rely upon the fact that the money did not come to the hands of *Leslie*: a trustee is liable for a breach of trust if he be aware of the transaction, even though he has not received any part of the trust funds; *Brice v. Stokes(a)*, *Townley v. Sherborn(b)*.

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Mr. W. Brooke, and Mr. Butt for *Christiana P. Leslie*.

There was not any breach of trust committed by the exercise of the power of sale, at the period in question. The power, as given by the articles of 1801, was to sell the whole or any part of the lands, thereby authorizing a sale of all the parcels of the lands, without reference to the quantity of the estate; and shewing that the criticism of the Plaintiff's counsel upon the effect of the word "whole," is totally unfounded. The settlement of 1804 seems to remove all difficulty; for there the power is to sell "the whole or any part of the said *Catherine's* estate or interest." But even if the words in this latter instrument were not as strong as they are, the cases would fully justify the propriety of the sale. In *Uvedale v. Uvedale(c)*, where there was a devise of lands to the testator's wife for life, and after her death, the testator willed that same should be sold, Lord *Hardwicke* held that the words "after her decease" were not put in to postpone the sale; and he said: "if this had been a devise of a remainder or reversion to trustees to sell, the difficulty would have been removed, for the Court then would have directed them to sell." The opinion of Mr. *Hargrave* is to the same effect, *Co. Litt.(d)*;

(a) 11 Ves. 319.

(b) Sir J. Bridg. 35.

(c) 3 Atk. 117.

(d) 113 a. (n. 2).

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Clark v. Seymour(a), is a direct authority upon the question. *Meyrick v. Coutts*(b), which at first sight would seem to be opposed to these authorities, is really not in the least inconsistent, for there the power of sale did not arise until after the death of the tenant for life. But even assuming that a breach of trust was committed, the release to one of the trustees, *Blackwood*, executed with full knowledge of the circumstances, operates clearly to the release of the others; for otherwise, inasmuch as the latter, by having been himself made accountable, would have an equity to call upon the former to recoup him. In *Walker v. Symonds*(c), the release would in the result be a mere waste paper. It is said at the other side, that a cestui que trust is at liberty to proceed against any one of a number of trustees implicated in a breach of trust. The rule of this Court is not so: all of such trustees must be brought before the Court, *Munch v. Cocherell*(d).

Mr. Serjeant *Warren*, and Mr. *Gayer*, for the Defendant, *Borrowes*.

Borrowes acted as the mere agent of one of the trustees; he was himself beneficially entitled to a portion of the property in question, but he was not a trustee, nor invested with any fiduciary character; he is not, therefore, in any way liable, *Stacey v. Elph*(e). *Borrowes* in his answer represents fully the circumstances of the case; and exculpates himself from anything like blame, in a moral point of view, for not having procured the trustees to join in the sale. He appears to have acted not professionally

(a) 7 Sim. 67.

(b) Treatise of Powers, vol. i.

p. 350.

(c) 3 Swanst. 1, 77.

(d) 8 Sim. 219.

(e) 1 Mylne & K. 195.

or for emolument, but simply to advance the interests of all parties as far as possible. In the result, what has the Plaintiff to complain of? It is true, that the trust funds have been lent out upon personal securities, contrary to the provisions of the trust, but these investments are perfectly secure: Mr. *La Touche*, one of the trustees, to whom a portion of this money has been lent, is a gentleman of large fortune; and the residue is secured by a policy of insurance upon the life of the Plaintiff's father, which, if now surrendered, would produce a much larger sum than that for which it was originally contracted. The letters of the 9th and 18th of September, 1839, not only shew that the Plaintiff was perfectly aware of the nature of these investments, but actually amount to an adoption of them. If the Court thinks proper, the Defendant, *Borrowes*, is willing now, upon an assignment of these securities, to pay in the sum invested in them.

Mr. *Moore* in reply.

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THE LORD CHANCELLOR:—

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The discussion which has taken place has made this case somewhat plainer than at first sight it appeared to be: it now seems to lie in a small compass.

Catherine Madden, the mother of the present Plaintiff, was entitled to an estate in England in remainder, expectant upon the deaths of her father and grandfather, and being about to be married, articles were executed, whereby this estate, together with some other property, was made the subject of settlement. The arrangement was, that the

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young lady, when she should attain her full age, would convey the lands to the uses of the settlement, and the father and grandfather, who were the owners of the previous life estates, agreed to join therein, without prejudice, of course, to their life estates; and there was a proviso that the trustees should have power to sell the whole or any part of the lands, and invest the produce in the purchase of estates in Ireland or in Government securities, such estates, as the case might be, or Government securities, which were to be regarded as land, when purchased, to be subject to the trusts of the settlement. The only uses declared were to the husband and wife and their issue. There was no resettlement of the estates of the previous tenants for life, nor any provision for them. It appears to be clear that the power of sale extended over the whole subject of the settlement, but the question arises, what is the true construction of such a power of sale, not confined in terms to be exercised when the estates should fall into possession.

It is settled by the authorities, that unless there be a restriction against an immediate sale, the power may be exercised at once, so as to increase, or rather advance, the interest of the tenant for life at the expense of the remainder-man; for if, instead of waiting for the expiration of the particular estate, the reversionary interest be sold, it must, of course, be sold at a much less price than the estate in possession would have produced. The authorities have, however, settled the question, and wisely, I think, established, that if there be no intention expressed, the power may be exercised immediately.

It is then stated that a settlement was executed about

three years afterwards, upon the young lady's coming of age, by which the rights were altered. By that settlement the lady's father (the grandfather having died in the meantime) and the wife, with the consent of the husband, conveyed to the trustees. It has been argued that this is not a conveyance of the legal estate, inasmuch as the husband did not join as a conveying party, but he covenanted that he and his wife would levy a fine, and that the father would join therein for the purpose of effectually conveying the estate to the uses of the settlement, and without such fine the settlement would have rested upon the articles of 1801. By this deed, the tenant for life having joined with the party in remainder, the whole fee passed to the trustees; and the uses were declared to be, as to part of the lands, to the father for life, and as to that part so limited to the father, from the period of his death, and as to the residue, from the date of the settlement, to the wife and her husband for successive life estates, and then to the younger children of the marriage in equal shares in tail general. There were two powers in the settlement, a power of leasing and a power of sale. The power of leasing is given to the tenant for life, the father, and then to the husband and wife, when in actual possession, and they are thereby empowered to make certain leases. The framer of this settlement knew perfectly well how to express such an intent, and to prepare a power of leasing, which was to be restricted as to the time of its being exercised; but he did not frame the power of sale in a very workmanlike manner; still the intention is clear. Before, in the former power the language is, that the parties may grant leases, "when and as they shall be respectively in the actual possession of the said messuages, lands, &c." In the power of sale the

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expression is, that it shall be lawful for the trustees "to sell the whole, or any part of the said *Catherine's* estate and interest in the said lands, &c." Now her interest was a remainder in fee, expectant upon the life estate of her father: the power of leasing was given to the parties, as they should be respectively in possession. The power of sale was general: it was over the estate and interest of the lady, whether in possession or not, although not expressed in terms. It is said that this would introduce some difficulty in the manner of limiting the uses of the produce of the estates, which were declared to be subject to the uses before specified. No doubt in words the limitations of these uses would seem to include the life estate of the father, but that was not the intention, because, if the power of sale is confined to the estate and interest of *Catherine*, and her remainder only was sold under the power, it would, of course, be against the intention to give the father a life interest in the produce of the sale; that sale could not comprise the father's life estate, because the power did not extend over it. When, therefore, the deed speaks of the produce being held upon the uses and trusts thereinbefore declared, I must consider it as applying only to the uses and trusts, which would be affected by the sale; that, I think, is clear upon the settlement, and it is only a difficulty in conveyancing.

But supposing it to be otherwise, and that this deed does not carry out the articles, or regulate the rights of the parties, another question might arise. The case of *Darnford v. Lane(a)*, and that class of cases decide, that though in the case of marriage articles, executed by the wife while under

(a) 1 Bro. C. C. 106.

ge, she is not bound, still the husband cannot join with the wife, when she comes of age, in varying the articles. So far, therefore, the articles of 1801 must be regarded as the binding instrument. That question does not, however, arise here, because I am not called upon to decide upon the rights of the purchasers; I am not obliged to consider whether the purchasers have or have not a good title, but whether the sale was properly made or not, with a view to the question of the breach of trust. I am of opinion that there was not any breach of trust committed by the exercise of the power of sale; I think that the remainder might properly be sold under this power, and if so, there could not have been a more desirable opportunity to sell, than the period that was chosen, when the tenant for life was willing to concur in the sale, and when the prices of land ran so high; besides, there is no reason to suppose that Mr. *Borrowes* intended to sacrifice the property; he was the proprietor of another portion of the property, and it was his interest that all should be sold at the highest price. If the sale had been at an undervalue, he himself would have been a proportionate sufferer. There can be no doubt, I think, that the sale was a prudent one.

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In the conveyances to the purchasers there is much to be regretted; by keeping back the settlement a wrong has been done to the purchasers; to say the least, a great irregularity has been committed, and the purchasers have great reason to complain; but I do not think there is the slightest ground for imputing to Mr. *Borrowes* any blame in a moral point of view. The accounts are produced which were made out immediately after the sale; they are made out regularly, and although London solicitors were employed, Mr. *Borrowes* took the management of the affairs,

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being a solicitor himself of great practice and knowledge; in fact, he had the principal direction of the sale. The accounts appear to be in all respects correct and regular, and the money seems to have been properly accounted for.

It is said, and with great reason, that this sale should have been conducted by the trustees, and if this had been a recent transaction, and there had not been any intermediate conveyances, there might have been some ground for the present suit; but now many years have been suffered to elapse, and it has not been even suggested that a higher price could have been obtained, and as the produce is still forthcoming, I do not think that the Plaintiff has much reason to complain. The trustees were, however, put forward in 1813 as having the title, and Colonel Leslie was then alive and unquestionably acted; the other trustee seems not to have acted. Generally speaking, where a sale has been made without the concurrence of the trustees, yet if the sale was a proper one, and the trustees have adopted it, the Court will carry it into execution. Here the sale was *bond fide*; the money has been received and accounted for, and I could not now unravel the whole transaction, because, if I were to do so, I should be obliged not only to defeat the title of the purchasers, who are not before the Court, but to direct all the purchase-money to be repaid; besides, no such relief is sought for by this bill, which only seeks to make the Defendants liable for their alleged breach of trust.

In this state of things, the money from the sale having been received, and lent, partly to the husband and partly to Mr. *La Touche*, upon their personal securities, there

rose a misunderstanding as to the effect of the settlement; it was supposed that the wife was entitled to a separate life estate in the property, and the application of a part of the fund to the payment of the premium upon a policy of insurance, by which the loan to the husband was secured, was brought into question. I should mention, that proceedings had been previously instituted by Mr. *Blackwood*, the trustee, against Mr. *Brady*, the husband, in consequence of the irregularity in the payment of the interest, upon a sum of money which had been lent by Mr. *Blackwood* to him; and the attention of Mr. *Blackwood* having been called, as well to this supposed claim, on the part of the wife, as also to the manner in which the trust-funds had been invested, and the consequent breach of trust, a case was prepared under the inspection of Mr. *Borrowes*, and laid before Mr. *Blackburne*, for his opinion as to the rights of the parties, and his general advice. In this case all the facts were stated as regarded the actual sale which had taken place, but the fact was not disclosed that the father had been paid a portion of the produce for his life estate; but assuming that the sale produced the value of the fee of the estate, I cannot doubt that a due proportion was allotted to the remainder. I cannot now question the correctness of the value put upon the interest of the tenant for life, which was ascertained by Mr. *Morgan*, the eminent actuary. The portion then fixed was paid to the tenant for life, so that, from the time of the sale up to the present moment, there has been no concealment of the real nature of the transaction. Looking at the case in this point of view, and being of opinion that the power did authorize the sale, it appears to me that I cannot now visit the Defendants with the consequences of a breach of trust, although

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I cannot but say, that in the management of the sale very great irregularities were committed, and such, that if the case had come recently before me, and with different parties, I might have been inclined to make a different decree.

It appears, from the opinion on the case to which I have referred, that it was considered to be important that a compromise should be entered into. It is manifest, from the letters written by the lady, that she was making some compromise for the benefit of her father; she was of an age to form a judgment, and had, if I am to judge from her letters, full capacity to determine what was most for her interest. No attempt was made to take advantage of her, and there is not the slightest evidence to shew that any misrepresentation was made. Under such circumstances she consented to a particular arrangement, by which she made a sacrifice, and obtained a benefit: for the consideration allowed to her father she released Mr. *Blackwood*. The deed of 1839 was manifestly prepared under the direction of Mr. *Blackburne*, the first advice that could possibly be obtained at the time, and by this deed, carefully perused, and in some respects altered by him, reciting the several breaches of trust which had been committed, in reference to the investment of the produce of the sale, and which certainly were breaches of trust, but not in any manner touching upon the sale of the remainder, which I have already decided not to be a breach of trust, the parties carried out the agreement into which they had previously entered, and Mr. *Blackwood* became thereby fully released and discharged from all responsibility. The Plaintiff, at that time, chose to execute this deed, with a perfect knowledge of the

manner in which the sale had been conducted, the mode in which the funds had been disposed of, and the securities upon which they had been invested, and she accepted of those securities as they then stood. Her letters shew how fully informed she was; she speaks of them with accuracy, and describes one of them as consisting of the policy; indeed I understand it now to be admitted at the bar, on the part of the Plaintiff, that no relief can be had against Mr. *Blackwood*; he is not guilty of fraud, or of any actual breach of trust; he was liable, no doubt, for his neglect, and was responsible from the moment when he knew what had taken place, and ought at once to have put himself into activity, but the Plaintiff chose to release him, and he gave her a valuable consideration for that release.

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But it is said, why is not the Plaintiff to have relief against Colonel *Leslie's* estate? He, no doubt, was bound in respect of the breach of trust, and he or his personal representative might have been made responsible, if the Plaintiff had not estopped herself from the relief which she now seeks. I do not rely upon the technical ground of the release of one trustee operating as a release to the other, but I decide upon the substance and merits of the case. If two trustees are liable for a breach of trust, and the *cestui que trust* says to one, "I release you from all liability in respect of certain securities, and I am willing to allow the money to remain upon those very securities," the case does not rest upon mere technical grounds; if she had said to Mr. *Blackwood*, "I release you, but I do not intend to accept the securities, or to give up my right to make Colonel *Leslie* answer for his default," the question would have been a different one, and I am not called

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 v.
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 —
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upon to consider it. As the case stands, I think it very clear that the deed of July, 1839, operated not only as a release of *Blackwood*, but also as an acceptance by the Plaintiff of the securities.

It does not appear that the Plaintiff has any great reason to complain; one of the securities is represented to be most desirable, the debtor being a gentleman of considerable property; and the other is secured by a policy of insurance, upon which several bonuses have been declared, exceeding considerably the sum intended to be insured. It is stated that the Insurance Office would at present give a sum of 4000*l.* for the policy, and if the Plaintiff chooses to keep the policy on foot, the sum she will receive must be much larger. The Plaintiff, therefore, has suffered no damage; if she ever could have impeached the transaction, she has precluded herself from doing so by her own acts. I apprehend, therefore, that her right to relief, as against these parties, wholly fails; and the question then is, has she any right to relief against Mr. *Borrowes*; he was not a trustee, but he acted as her friend, and, perhaps, may be considered to have been in some sense her solicitor, but the whole transaction was carried on by the London solicitors, and there is nothing to charge him; he was but an agent, and the agent of the trustees only, and as the trustees are not responsible, how can I hold the agent to be responsible? The Plaintiff, by her own acts, has precluded herself from impeaching the conduct of the principal, how then can she affect the agent?

It would seem to be almost of course to dismiss this bill with costs, but there has been such irregularity in the

conduct of the sale, and the circumstances connected with it appear to have required so much investigation, that my opinion is I ought to dismiss the bill without costs.

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SPUNNER v. DWYER.

DAVID LYNCH, the testator in this cause, duly made his will, bearing date the 20th of August, 1802, and thereby, after reciting that he had three grandsons, for whom he intended to make a provision, viz., *Michael* and *David Lynch*, sons of the said testator's eldest son, *Thomas Lynch*, and *James Shaughnessy*, the eldest son of *James Shaughnessy* of Ballybricken, and *Catherine* his wife, who was the daughter of the testator, devised and bequeathed his property in the terms following, viz.: "I give, devise, and bequeath my farm of Bantabee to my grandson *Michael Lynch*, and every kind of stock thereon, together with the one-third part of every other property that I now possess or am entitled unto. I leave and devise my farm of Lackanagour, and the stock of every kind thereon, to my grandson *David Lynch*, and also my farm of Lisduane, with the stock also thereon, together with one-third of my said property, of every kind and nature whatsoever, as aforesaid. I leave, devise, and bequeath the farm of Ballyconnealy, and the mill adjoining the same, and all the stock thereon, to my grandson, *James Shaugh-*

May 27.
A testator gave his farm of A. with the stock and one-third of his residuary property, to his grandson X., and his farms of B. and C., with the remaining two-thirds of the residue of his property, to his grandsons Y. and Z., and bequeathed to his wife an annuity to be paid to her during her life, by his said three grandsons, share and share alike. The farms of A., B., and C. were held under terminable leases, and the testator declared, that his said grandsons, or their heirs, "on the fall of any lease, were to be equal sufferers, pursuant to their re-

spective proportions." The testator, at the time of making his will, and at the time of his death, was also seised for two lives of the farm of Blackacre, which passed under the will as part of his residuary property:—

Held, that on the fall of the leases under which A., B., and C. were held, a purchaser of Blackacre would not be liable to a demand for contribution; for that the true construction of the clause, declaring that the grandsons were to be equal sufferers on the fall of any lease, was that which confined its operation to the leases specifically mentioned and devised by the will.

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Statement.

nessy, together also with the one-third part of every other property that I die possessed of, with remainder to the rest of the issue of the said *Catherine*." And the testator thereby directed that the said *Thomas Lynch* should possess and enjoy the lands so devised to his sons *Michael* and *David*, until they should respectively attain their ages of twenty-one years; and that *James Shaughnessy*, and *Catherine* his wife, should possess and enjoy the lands so devised to *James Shaughnessy* the younger, their son, until he should attain the age of twenty-one years.

The testator also thereby gave an annuity of 18*l.* per annum to his wife, which he directed should "be paid unto her during her life, by my said three grandsons, share and share alike, or by their executors," and then proceeded thus: "I order and direct, that in case my grandson, *David Shaughnessy*, should not enjoy or receive any of the property hereby willed to his brother *James*, that in such case 300*l.* may be put out at interest immediately after my decease for his use, and to be paid to him, with the interest, after he attains his age of twenty-one years, and behaves himself dutifully to his parents, otherwise to remain as first bequeathed to my three grandsons; the said sum to be deducted equally from and out of the property herein first bequeathed to my three grandsons, who, or their heirs, on the fall of any lease, are to be equal sufferers, pursuant to their respective proportions."

The lands of Lisduane, mentioned in the will, were held by the testator for an unexpired term of years; the other lands which he devised, *nominatim*, were held under leases for lives, in each of which one life was in existence at the time of making his will. The testator was

also then seised of the lands of Graigue, under a lease for three lives, dated the 20th of July, 1792, two of which were *in esse* at the date of the will, and at the time of the Master's report in the present cause.

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The testator died shortly after the date of his will, and his three grandsons entered into possession of the properties, to which they were respectively entitled under the will.

In the year 1811, the lease, under which the lands of Lisduane were held, expired, and it appeared from the Master's report in this cause, that *David Lynch*, the devisee in those lands, received contribution for the loss from *Michael Lynch* and *James Shaughnessy*, down to the year 1821, when he became an insolvent debtor.

By indenture, dated the 8th of May, 1815, *Michael Lynch*, in consideration of 150*l.*, assigned his undivided third share of the lands of Graigue to *David Lynch*. Shortly after the date of that assignment, *David Lynch* married *Mary Power*, and by the settlement executed upon that occasion, after reciting his interests under the will of his grandfather, and his right to contribution in consequence of the expiration of the lease of Lisduane, he conveyed the farm of Lachanagour, his two undivided third parts of Graigue, and his said right of contribution, to trustees, upon trust for himself for life, then to pay 100*l.* per annum to his intended wife, *Mary Power*, for her life, by way of jointure, and to raise a sum of 1500*l.*, with interest, for the issue of the said intended marriage.

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 —
Statement.

By mesne assignment the lands of Graigue, subject to the rights of *Mary Lynch*, became subsequently vested in *John Stephen Dwyer*, the Defendant in this cause. *David Lynch* died on the 6th of June, 1832, leaving his widow, *Mary Lynch*, him surviving.

The present suit was instituted to obtain payment of the debts of *Dwyer*, by a sale of his property, and accordingly a decree for that purpose was pronounced, and under that decree the lands of Graigue were sold.

A reference was directed to the Master to inquire and report concerning the rights of *Mary Lynch*, and the Master having proceeded with that reference, found that her jointure of 100*l.* a-year was well charged on two-thirds of the lands of Graigue, and that the remaining third, with other lands, was liable to contribution under the trusts of the will of the testator.

To this report exceptions were taken by the Plaintiff in the cause, and having been allowed by His Honor the Master of the Rolls, the case now came on to be heard before the Lord Chancellor, upon the application of *Mary Lynch*, who appealed from the decision of the Master of the Rolls.

Argument.

Mr. *Pigot* and Mr. *Close*, for the Appellant.

The rights of *Mary Lynch*, in reference to contribution under the will of the testator in this case, were correctly found by the Master's report. Two objections to that report have been relied on, the first is, that the charge for contribution is void, upon the ground of remoteness; the second objection, and that which was adopted by the

Master of the Rolls, is, that the clause of the testator's will, by which that charge was created, is void for uncertainty. The first of these objections may be very shortly disposed of, by referring to the nature of the tenure under which the property is held, for, as the leases themselves were demises for lives in being, a right of contribution, which is directed to operate immediately upon the determination of any of those leases, cannot be too remote. With regard to uncertainty, the will is not more difficult to interpret than untechnical instruments generally are. The testator evidently intended equal gifts to his three grandsons, but, considering the uncertain and unequal duration of human life, felt that some of the leases might, and in all probability would, determine before others, and, consequently, that those benefits which he intended to be equal would then become unequal; and he accordingly provided against that contingency by the declaration that his three grandsons, "or their heirs, on the fall of any lease, are to be equal sufferers, according to their respective proportions," that is to say, according to their present equal shares, which he intended should continue. His Honor, the Master of the Rolls, relied on the case of *Jones d. Henry v. Hancock*(a), but that was the case of a legal demise, while here there is a trust to be executed by this Court. At Law, perhaps, the values should have been made to appear on the face of the instrument, but there is not any such principle in Equity.

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Argument.

Mr. Serjeant *Warren*, Mr. *Martley*, and Mr. *Griffith*,
for the Plaintiff.

The clause is uncertain and void. The gifts are not equal,

(a) 4 Dow. 145.

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at least their alleged equality does not appear upon the face of the will on the report, or from any evidence before the Court. How, then, can the grandsons be equal sufferers according to their unequal proportions? Again, is it not uncertain what part of the testator's property he intended to charge with contribution? Is the stock of the farm subject to it? and if so, how and when is that stock to be valued? In *Wood v. Ingersole*(a), a testator devised lands in three counties to his three sons, and added, that if any of his said sons died, the one of them should be heir unto the other. On the death of the eldest son, the land devised to him was claimed by the other two; but the Court held that the clause in question was uncertain and void.

Mr. Close, in reply.

The cases of *Tooke v. Hastings*(b), and *Roundell v. Breary*(c), were mentioned.

Judgment.

THE LORD CHANCELLOR:—

I feel some difficulty in disposing of this case, from the manner in which it comes before me, and from the circumstance, that all the parties interested in the question are not before the Court.

It has been contended that the direction contained in the will of *David Lynch* is altogether void for uncertainty. I do not think so, although I agree that it is difficult to effectuate the intention of the testator, or to know how to deal with the case. The testator seems to have thought that

(a) 1 Bulsts. 61; Cro. Jac. 260.
See *Thomason v. Moses*, 5 Beav. 77.

(b) 2 Vern. 97.
(c) 2 Vern. 481.

he had provided equally for his three grandsons, the devisees, for by his will he directs that they shall bear, "share and share alike," the annuity charged in favour of his widow on the gifts to them, without any reference to the value of those respective gifts. And so again, when providing for a fourth grandson a sum of 300*l.*, the testator says, "the said sum to be deducted equally from and out of the property herein first bequeathed to my grandsons:" I think that the word "equally" here, coupled with the fact of the testator having already charged the annuity on the several devises "share and share alike," is sufficient to shew that the testator thought he had given his grandsons such equal interests, that he might fairly throw upon them equal charges. Supposing this to be so, then we have to consider the words upon which the controversy has arisen; "the said sum (the 300*l.*) to be deducted equally from and out of the property herein first bequeathed to my grandsons, who, or their heirs, on the fall of any lease, are to be equal sufferers, pursuant to their respective proportions." Before the testator had used the word "equally," now he says they are to be "equal" sufferers, according to "their respective proportions." The first two charges were to borne equally, without reference to value. This is the only sensible construction; any other would be inconvenient, and, by rendering a valuation necessary, would be productive of great expense, which the testator could not have contemplated; but when speaking of the loss occasioned by the fall of a lease, his language is different, and his meaning must also be presumed to be different. On the whole, I am disposed to think that the true construction is, that each grandson was to bear, out of his own proportion, the loss which should be incurred by reason of the fall of a lease of any of the lands

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Dwyer.

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DYVER.

Judgment.

included in his share, and should not be entitled to any contribution from the other grandsons. Effect cannot be given to every word in the clause : the words are not used in their proper sense ; the clause seems to be an affirmative pregnant with a negative, and in my opinion rather implies that there should not be any contribution.

If this be not the true construction of the will, it becomes a most difficult case to deal with. How can the words, " herein first bequeathed to my three grandsons," be taken to confine this clause to the leases which are specifically given to each grandchild, for all the property is disposed of in one gift to each, and these leases are coupled with the stock, and the share of the residue bequeathed to each grandchild ? If the clause be not so confined, but should be held to extend to all the property, either the property must be detained in Court, or a valuation be set upon it ; and not only must the value of the leases be ascertained, but also of the stock, and the residuary property, for they are all charged.

The last argument was this : that the clause does not include all the property, but only the leases to which the testator was entitled ; but where in the will is there any mention made of this lease of Graigue, which is now the only subject of dispute ? The lease is not described as such, or at all particularly referred to ; it passed under the residuary gifts. If, therefore, this clause is to be confined to the leases of the testator, it must be confined to those which he had specifically devised, and then there is no doubt. I will not say that the devise as to this clause is void for uncertainty, but I think that the words " or their heirs," shew that the clause must be confined to the leases

Specifically given, and upon that ground I affirm the order of the Master of the Rolls.

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With regard to the question of uncertainty, the Courts have gone so far in yielding to objections upon this ground, that I think, the Appellant would not have much chance of sustaining this clause. The case of *Doe v. Joinville*(a) is an illustration of the length to which the Courts have gone, although I must say I think that case a little doubtful. There a devise "unto my brother and sister's family" was held void for uncertainty merely because the letter was not introduced after the word "brother," and the Court refused to supply the omission.

This is not a case for costs.

(a) 3 East, 172.

ROSSITER v. WALSH.

THE bill in this case was filed to set aside a lease of the 23rd of May, 1834, and stated the following case:

The Plaintiffs, *Maria Rossiter, Catherine Rossiter, Isabella Rossiter, and Cecilia Rossiter Byrne*, were the four daughters of *James Rossiter*, and upon his decease, as his co-heiresses, they became seised quasi in fee of the lands of Rosemount in the county of Wexford, which were held by their father under a lease for three lives, with covenant for perpetual renewal. In the year 1830, the

June 7.

In the year 1830, the Plaintiffs, who were four sisters, employed a common agent, to receive their rents and manage their estate: one of the sisters only resided in this country, and the agent acted under a general power of attorney, executed by the three who were resident abroad.

In the year 1834, the agent granted to the Defendant (who acted as under-agent upon the estate) a lease of sixteen acres, and executed same in the name of the four Plaintiffs, "by virtue of the letter of attorney, bearing date," &c. At this period the agent was in embarrassed circumstances, and very shortly afterwards he absconded from the country. Upon a bill filed by the four sisters impeaching the lease:—Held, that it could not be sustained.

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WALSH.

Statement.

Plaintiffs—three of whom, *Maria, Catherine, and Isabella*, resided abroad—employed Mr. *John Archbold* as their land-agent: and *Archbold*, who was a near relative of the Plaintiffs, and was alleged to be a person in whom the Plaintiffs reposed much confidence, having represented that a power of attorney was necessary to enable him to manage the property, a power of attorney was executed on the 15th of July, 1833, by three of the Plaintiffs, *Maria, Catherine, and Isabella*, authorizing *Archbold* to manage the estate, and to contract for and execute leases and other deeds which should be necessary for said purpose.

The Defendant, *John Walsh*, was employed as a sub-agent or assistant to *Archbold*; and he acted as land-steward or bailiff, transacting matters connected with the estate, such as answering letters written to him, as being resident upon the lands, or transmitting the rents of the tenants, when it did not suit the convenience of *Archbold* to go to the lands in person.

The lands of Rosemount, prior to the year 1833, were held by Mr. *Watson*, at a rent of 4l. per acre. *Watson*, having become involved in pecuniary difficulties, gave up the possession of the lands, whereupon *Walsh* became tenant from year to year to about sixteen acres.

In the year 1834, *Archbold* executed to the Defendant *Walsh* the lease in question: this lease bore date the 23rd of May, 1834, and was expressed to have been made between the four sisters of the one part, and the Defendant *John Walsh*, of the other part: it purported to convey to *Walsh* sixteen acres of the lands of Rosemount, for the term of one life, or thirty-one years, whichever should last

the longest, at the yearly rent of 64*l.*; and it contained a covenant, binding the Plaintiffs, their heirs or assigns, to add ten years to the said term, if the Defendant, his heirs or assigns, should at any time, during the continuance of the said term, require them so to do. The lease was executed by *Archbold*, "by virtue of a letter of attorney from the said *Maria Rossiter*, *Catherine Rossiter*, *Isabella Rossiter*, and *Cecilia Rossiter Byrne*, bearing date the 15th of July, 1833:" and almost immediately after the execution of the lease, *Archbold*, who had become embarrassed, absconded.

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Statement.

The bill charged that though *Archbold* and *Walsh* were in the habit of frequently communicating with the Plaintiff, *Cecilia Rossiter Byrne*, who resided near Dublin, with respect to various proposed leases, and other matters relating to the management of the estate, yet that neither the said Plaintiff, *Cecilia*, or any of the other Plaintiffs, were, either directly or indirectly, made acquainted with the execution of the said lease: but that, on the contrary, the same was studiously concealed from them until after *Archbold* had left the country.

The bill, charged that the lease was made at a gross undervalue; that the lands, which were of valuable quality, being in the vicinity of New Ross, and adjoining the River Barrow, were well worth a rent of 108*l.* 4*s.*; that the part demised was situated so as greatly to prejudice the value of the remainder of the property, which consisted partly of upland and partly of pasture lands; that the Defendant was fully aware of the value and circumstances of said lands; that he was acting in a fiduciary character with respect to the Plaintiffs, and ought to have assisted

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in protecting their interests, instead of fraudulently colluding with *Archbold* to take advantage of them.

The bill also charged, that the power of attorney under which *Archbold* acted was never executed by the Plaintiff, *Cecilia Rossiter Byrne*, nor had she in any manner ever authorized the execution of the lease; and that both *Archbold* and the Defendant were fully aware thereof at the time.

The bill prayed that the lease might be declared fraudulent and void: and for an account of the rents of the lands comprised therein received by the Defendant, or which without wilful default he might have received, from the time he went into possession: and that, in taking such account, the Defendant might be charged with the full and utmost yearly rent which the lands might have produced, if let to a solvent tenant.

The Defendant, *Walsh*, by his answer, admitted that he occasionally acted as land-steward or bailiff under *Archbold*, and in obedience to his orders, but denied that he occupied any confidential situation in relation to the Plaintiffs, or filled any character which disqualified him for treating for the lease in question: he stated that he had never in any manner concealed the fact of such lease, and that, on the contrary, the Plaintiff, *Cecilia Rossiter Byrne*, must have been fully aware of said lease having been made, inasmuch as, upon *Watson's* giving up the possession of the lands, he entered into the possession of the sixteen acres, as tenant from year to year, and as such, occupied the said lands at the same rent paid by *Watson*, with the full knowledge and consent of the Plaintiff, *Cecilia*. The Defendant by his answer admitted that the lands were

a valuable quality, but denied that the rent reserved by the lease, which was in point of fact 4*l.* per acre, was not full value, or that a higher rent could have been procured for same lands from a solvent tenant; he positively denied that he gave to *Archbold* any consideration, monetary or otherwise, in order to induce him to execute the lease in question: and he submitted that this lease, as made at full value, and executed as it had been by *Archbold* for three of the Plaintiffs by virtue of the power of attorney, and for the fourth with her full knowledge, was a good and valid instrument.

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The evidence of the witnesses, who were examined as to value, was conflicting: but as the case was not decided upon this point, it is not necessary to refer to that evidence particularly.

With respect to the fact of knowledge of the lease by *Cecilia Rossiter Byrne*, the Defendant gave in evidence a receipt signed by *Cecilia Rossiter Byrne*, for 32*l.* received from *John Walsh*, "being the amount of half a year's rent due to the Miss *Rossiters* and Mrs. *Byrne*, as tenant of the sixteen acres holding of the lands of Rosemount, due and ending the 1st of May, 1837."

The testimony of *Archbold*, who was examined on the part of the Defendant, was also read to the effect that he had not any written authority from Mrs. *Byrne*, but that he consulted her, and communicated with her on the subject of said lease, and that under her verbal directions, and with her full sanction, he executed same.

Mr. Serjeant *Warren*, Mr. *Brewster*, and Mr. *Gayer*, for the Plaintiffs.

1843. Mr. *Richard Moore*, Mr. *Martley*, and Mr. *George*, for
 ROSSITER the Defendant.
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 Argument.

The following cases were cited: *Harris v. Tremenhare*(a)
Lord Selsey v. Rhoades(b), *Molony v. Kernan*(c).

Judgment. THE LORD CHANCELLOR:—

In this case it appears that four ladies, who are the Plaintiffs, were entitled to the lands included in the lease in question. Three of them were resident abroad, and one them, Mrs. *Byrne*, who was a widow, resided in this country. In 1830, upon the death of a Mr. *Rossiter*, who had been the agent of these ladies, one of them wrote from abroad to Mr. *Archbold*, who was a relation of the family, stating that it was the wish of all parties that he should act as their agent. Mr. *Archbold*, having been appointed agent, required, and ultimately obtained, a power of attorney to enable him to execute such leases as might be required for the judicious management of the property. This power of attorney was signed by the three sisters, who were abroad, but not by Mrs. *Byrne*, who, however, was in constant communication with *Archbold* respecting the property. In this way, *Archbold* represented the four sisters. He was the regularly appointed attorney of the three, and he was in fact the agent of the fourth, and they all together constituted his principal.

At this time *Archbold* was residing in Waterford, at

(a) 15 Ves. 34.

(c) *Ante*, vol. ii. p. 31.

(b) 2 Sim. & S. 41; 1 Bligh, 1.

considerable distance from the lands, and he required under-agent to assist him. Accordingly *Walsh*, the sent Defendant, was appointed : and it appears that he had the character, not of a mere bailiff or driver upon estate, but of a sub-agent acting under *Archbold*: the depositions, which have been read in evidence, shew that he assumed the character of agent, communicating at times directly with Mrs. *Byrne*, and advising with her as to the tenants. The lands of Rosemount, of which the lease in question comprised a part, contained in the whole nearly one hundred acres, and produced, all round, about 4*l.* per acre. They had been held by a person named *Watson*, who had become embarrassed, and quitted the country, *Walsh* (and this is a most important feature in the case), became tenant from year to year of a part of what had been so held. The amount of rent paid per acre for this portion was equal to what had been paid by *Watson* per acre for the whole of what he held. It is said that this valuation was unfair, inasmuch as the land which *Walsh* held consisted principally of lowland : whereas *Watson* had in addition a considerable quantity of upland, which would render the average rent paid by him for the whole more adequate to the value. It clearly was not provident management to make such a division of the estate : the value of the upland was increased when held with the lowland, and the two should have been let together, so as to enable a man to farm to advantage ; and as to the question of value, if as a juror I were obliged to come to a conclusion upon the evidence, I should be compelled to say that the full value had not been given. Still the rent reserved is not much below the real value. Most of the witnesses seem to rest the damage upon the fact of a portion of the property having been cut out from the

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 Judgment.

rest, rather than upon any deficiency in the amount of the actual rent. It is clear, however, that the outside value was not given. But if *Archbold* had acted with good faith, if, with care and caution, he had acted for his employers as he would have done for himself, I do not think that the evidence of value would be deemed such as to affect the lease.

There is this peculiarity in the case, that the Defendant, *Walsh*, was, with the knowledge of Mrs. *Byrne*, tenant from year to year at the precise rent which he now pays under the lease. *Archbold* by his evidence seeks to fix Mrs. *Byrne* with the knowledge of what took place, in relation to the tenancy of *Walsh*: but there is no evidence as to the manner in which *Walsh* became tenant in lieu of *Watson*: nor does it appear distinctly that the letting under this impeached lease was ever communicated to her. In addition to this, the lease is peculiar in its form: it is not only for a term certain, a life or thirty-one years I think, but it contains a covenant on the part of the lessors, that they will, on the demand of this party—the mere bailiff on the estate—grant an additional term of ten years more. Now where is there any mutuality in this stipulation? There was no reason for it. No one can suggest that a smaller rent than 4*l.* per acre ought to have been obtained for the farm. Again, there is no restriction imposed upon the tenant as to the manner in which he should be at liberty to treat the property. *Walsh*, in some of his letters to Mrs. *Byrne*, speaks of the course of husbandry that ought to be adopted. After this, when the very heart of the land was about to be let to himself, one would naturally expect to find some covenant not to break

up the land and let it out in con-acre, and thereby reap enormous profits at the expense of the landlord: but here is no such restriction in the lease; nothing beyond the ordinary covenant to keep the demised property in good repair and condition. Can I, then, say, that this was a provident lease? Clearly not: it was a highly improvident one: but still, if granted by a party having due power, and valid at law, I could not disturb it. But is such the case here? Three of the persons interested in the property executed a power of attorney to *Archbold*, authorizing him to grant leases; the power, it is true, was to enable him to act in concurrence with *Mrs. Byrne*, for the parties were all acting together, and there was no division of interest; *Archbold* was as much the agent of the three as of *Mrs. Byrne*; but still this power of attorney was never executed by *Mrs. Byrne*. *Archbold*, when he came to deal with the property, did not assume a power over three-fourths only; he demised all; and the lease, in the witnessing part, purports to be executed by *Archbold*, "by virtue of a letter of attorney" from the four sisters, "bearing date the 15th of July, 1833." But he had no such power of attorney from *Mrs. Byrne*; and as to her, therefore, the relief sought is quite of course. Now, then, is the lease to stand as against the other parties? Is it to be reformed, and three-fourths retained, or to be cancelled altogether, and the three-fourths to be re-demised to the Defendant? Looking at the substance of the contract, and the meaning of the parties, *Archbold* meant to lease the entire of the property, and *Walsh* to obtain a demise of the whole; but *Archbold* had no power to do what he assumed to do: yet he meant to do this or nothing, and the tenant, in like manner, only intended to take all. It would be injurious to the lessors to allow

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the lease to operate over three undivided shares. The lease cannot operate as intended by the parties, and, therefore, having regard to the circumstances, cannot have any operation at all.

When I look at the situation of the parties, and the time when this lease was executed; when I find that Archbold was, at that period, in pecuniary embarrassments; that within a very short time afterwards—in the following month, I believe—he left his residence in Waterford, and absconded; I must say that his conduct prevents me from placing any confidence in his acts. When he executed the lease, he must have forgotten his power, and he, the principal agent, granted it to his under-agent, just at the moment when he was about to quit the country. Under these circumstances, I think that this is a case, in which a Court of Equity is bound to interfere. I do not rely upon the deficiency of value, and, therefore, I shall give no account for the time past; but my decree is, that the lease be given up to be cancelled, and that the Plaintiffs be forthwith put into possession; the Defendant is to pay all rent due to the day of giving up possession, and also the costs of the suit.

Decree.

Decree the lease bearing date the 23rd of May, 1834, in the pleadings mentioned, to be given up to the Plaintiffs to be cancelled, and let the Plaintiffs be put forthwith into possession of the lands and premises comprised in said lease; and if necessary let an injunction issue for that purpose. Let the Defendant pay to the Plaintiffs the amount of rent which shall be due at the time of giving up possession of said premises, after all just credits and

wances, and, if necessary, refer it to the Master to
an account of the sum so due to said Plaintiffs; and
the Defendant pay to the Plaintiffs the costs of this

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LEADER v. AHEARNE.

ELLEN HAYES was seised in fee simple of one-sixth
of the lands of Drumgowna, and was possessed of
a sixth share of the lands of Byrrens, held for a long
term of years: *William Scannell*, her son by her first mar-
riage, was possessed of the other five-sixth shares of the
freehold premises.

June 10.

A vendor being
seised in fee of
lands, subject
to annuities
which she had
granted to an
attorney in
consideration
of advances
made and costs
incurred by
him, agreed to
sell the lands
to the Plaintiff,
stating to him
that the gran-
tee of the
annuities would
join in the con-
veyance. A
deed of convey-
ance was exe-
cuted by the
vendor: the
purchase mo-
ney was not
paid, but part
of it was de-
posited with
the attorney,
who had acted
for the vendor
and the Plain-
tiff, to remain
in his hands
until the lands
were discharged

There were some money dealings between *Ellen Hayes*
and *John* and *Matthew Ahearne*, who were practising at-
torneys, had done law business for her, and were charged
with the bill to be money-lenders; and by indenture, bear-
dated the 9th of February, 1830, for an alleged con-
sideration of 40*l.*, *Ellen Hayes* and *William Scannell*
granted to a person named *William Mackey*, in trust for
him and *Matthew Ahearne*, a rent-charge of 17*l.* 10*s.*, to
be payable out of the freehold and leasehold premises for
9 years; and by indenture dated the 27th of March,
1840, for an alleged consideration of 90*l.*, *Ellen Hayes*
and *William Scannell* granted to *Matthew Ahearne* a rent-

charge of the annuities. The Plaintiff then called on the vendor and the grantee of the annuities to
execute a deed of indemnity, which the parties declined to do. The vendor subsequently
conveyed the lands to the grantee of the annuities, who had actual notice of the Plaintiff's convey-
ance. On a bill filed to set aside the second sale:—*Held*, that the vendor was justified in
reversing the transaction between her and the Plaintiff as incomplete, and in selling to the
Plaintiff.

The vendor attempted to impeach the consideration of the annuities, but *Semble*, such a question
was not open to the Plaintiff.

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AHEARNE.

Statement.

charge of 10*l.* for twenty years, charged upon the same premises.

By indenture bearing date the 16th of January, 1832, after reciting the deeds of February and March, 1830, and that only 64*l.* 1*s.* 5½*d.* had been paid of the sum of 90*l.*, the consideration of the second deed, and that costs were due to *Matthew Ahearne*; and that for the further sum of 150*l.*, *Ellen Hayes* and *William Scannell* had agreed to grant to *Matthew Ahearne* an annuity of 50*l.* for sixteen years, *Ellen Hayes* and *William Scannell* granted said annuity to *William Ahearne*, and conveyed the said lands of Drumgowna and Byrrens to *Mathew Ahearne*, his executors, and assigns, administrators, for a term of 200 years, to secure the said annuity.

The bill charged that all those annuity deeds were usurious and void, and that the alleged considerations were never paid: and it was proved that the 150*l.* was retained to meet a demand for costs.

The rent of certain leasehold premises, of which *William Scannell* was the lessee, having been allowed to fall into arrear, an ejectment for nonpayment of rent was brought, and the lease was evicted. *Ellen Hayes*, who resided on the lands, and *William Scannell* became anxious to redeem those premises, and for that purpose attempted to raise money by a sale of her sixth share of Drumgowna. *Ellen Hayes*, in the first instance, proposed to sell to *Matthew Ahearne*, and then asked him to procure a purchaser, but he declined to interfere, until certain costs, which he alleged were due to him, should be taxed and paid; and by agreement it was referred to an attorney

named *O'Brien* to tax those costs. *John* and *Matthew Ahearne*, however, promised generally to facilitate the sale, and to join in the deed of conveyance to any purchaser *Ellen Hayes* could find.

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v.
AHEARNE.
Statement.

The costs were not taxed, but *O'Brien* suggested that *Thomas Leader*, the Plaintiff, would purchase *Drumgowna*; *Ellen Hayes* accordingly applied to him, representing that if he would purchase, the *Ahearnes* would release the lands from their rent-charges, and upon this representation the Plaintiff agreed to become the purchaser for the sum of 260*l*.

By deed, dated the 30th of August, 1836, *Ellen Hayes* conveyed her share of the said freehold lands to the Plaintiff, and the deed was registered on the 3rd of the following month. This deed was prepared by *O'Brien*, but did not contain any allusion to the annuities. The *Ahearnes* were not made parties to it, nor did it appear that they were at the time aware of its preparation or execution. No receipt for the 260*l*., the amount of the consideration, was indorsed on the deed, but shortly after its execution, 100*l*., part of the consideration was paid into *O'Brien's* hands, with a direction from the Plaintiff not to pay it over to *Ellen Hayes* until the lands were released from the annuities. A deed of indemnity against the annuities was then prepared and tendered for execution to the Defendants, who declined to sign it. There was not any evidence in the cause to shew that *Ellen Hayes* or *Scannell* had ever stipulated to execute such a deed, or that the Messrs. *Ahearne* had in any way agreed to release their rent-charges.

Immediately after the date of the registration of the

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 —
 Statement.

conveyance to the Plaintiff, *Ellen Hayes*, not having been paid the 260*l.*, or any part thereof, agreed to sell the same premises to the *Ahearnes* for 300*l.* ; and accordingly, by a deed, dated the 12th of September, 1836, for the alleged consideration of 300*l.*, she conveyed the lands to the *Ahearnes*. It was charged in the bill, and proved, that at the time of the execution of this deed the *Ahearnes* had express notice of the conveyance to the Plaintiff, and that the consideration of 300*l.* had not been paid ; the latter allegation, however, was disproved, and it appeared from the evidence in the cause that part of the money was applied in the redemption of the evicted premises.

Under the foregoing circumstances the present suit was instituted by Mr. *Leuder* against the *Ahearnes*, *Ellen Hayes*, and *Scannell*. The bill prayed, that the deed of the 30th of August, 1836, might be established, and the Plaintiff declared entitled to the lands thereby conveyed, discharged from all claims of the Defendants, and that the conveyance of the 12th of September, 1836, might be declared fraudulent and void against the Plaintiff, and that if necessary the considerations of the annuity deeds might be investigated.

Mr. Serjeant *Warren*, Mr. Serjeant *Keutinge*, and Mr. *Bowen*, for the Plaintiff.

Mr. *Pigot*, Mr. *Major*, Mr. *Deasy*, and Mr. *Stephens*, for the Defendants.

Judgment. THE LORD CHANCELLOR :—

The parties probably feel more anxiety with regard to the costs, than to the subject of the dispute, for if the Plaintiff

were to obtain a decree in his favour, it could only be upon the terms of his paying to the Defendants, Messrs. *Ahearne*, 300*l.*, the amount of the purchase-money paid by them, and it is admitted that the value of the lands does not exceed 260*l.*

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AHEARNE.
—
Judgment.

The transaction is a singular one. Mrs. *Hayes* having a small freehold estate, and having also an interest with *Scannell*, her son, in a leasehold property, granted certain annuities to Messrs. *Ahearne*. It was attempted at the bar to impeach those annuities, on the ground of the consideration having been tainted with usury; but it would not be open to the Plaintiff here, in his character of purchaser, to investigate the accounts, upon which the validity of those annuities depends, even though his bill had been properly framed for that purpose. I may, however, observe, that very little money reached Mrs. *Hayes*, the consideration being partly composed of costs, charged by Messrs. *Ahearne*, who were attorneys. Another leasehold interest, of which *William Scannell* was lessee, was evicted; and in order to raise money for its redemption, Mrs. *Hayes* became anxious to sell Drumgowna, the freehold estate. The *Ahearnes* declined to become the purchasers themselves, but promised generally not to stand in the way of a sale to any one else. The Plaintiff became the purchaser for 260*l.*, upon a representation, as it is alleged, that the *Ahearnes* would release the annuities; and it is now contended that the *Ahearnes* are bound by all that took place between Mrs. *Hayes* and the Plaintiff. But how does the case stand? It is proved that the *Ahearnes* promised generally to facilitate the sale, and to join in the conveyance, if a purchaser could be found; but it is not proved

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Judgment.

that they ever promised to release the lands from the annuities, without having the consideration, which they had given, repaid to them; nor was this promise made by the *Ahearnes* with reference to the Plaintiff, or to any particular purchaser. No person appears to have been at the time contemplated as the purchaser. A deed of conveyance to *Leader*, the Plaintiff, was prepared behind the backs of Messrs. *Ahearne*, purporting to be a plain conveyance of the fee to him in consideration of 260*l.*: it contained the usual covenants, but it did not contain a reference to any incumbrances, although the Plaintiff was then aware of the annuities, and the usual receipt was not indorsed on the deed. Part of the purchase-money, 100*l.*, appears to have been paid to *O'Brien*, Mrs. *Hayes*' attorney; but, according to the notice served by the Plaintiff, and which has been proved in the cause, this sum was not to be paid over to Mrs. *Hayes*, but was to remain in *O'Brien*'s hands, until a deed of indemnity was executed. A deed of indemnity was prepared by the Plaintiff, and, subsequently to the execution of the conveyance, tendered to Mrs. *Hayes* and *Scannell* for their execution. This deed recited the grant of the annuities, the eviction of the leasehold estate, Mrs. *Hayes*' agreement to sell the freehold estate, in order to enable her son *Scannell* to redeem, and she and her son were made charge and secure upon his property the annuities granted to the *Ahearnes*, as an indemnity for the estate sold to the Plaintiff. Now there is not a particle of evidence to show that there was any such contract. Mrs. *Hayes* and her son, in their answer, swear that there was not any such contract, and that it was an unwarranted addition of the Plaintiff. The deed of indemnity is proved, but it is not proved that the purchaser had any right to it. One of

ct of the sale was to procure money to redeem the lease-
old premises ; the money was required without delay, yet
e purchase-money was, it is said, to be retained until a
ed of indemnity was executed, for which the purchaser
id not contracted. The effect of such an agreement
ust have been to defeat the object of the sale. *O'Brien*
pt the 100*l.*; there is not any explanation why the
0*l.* was not paid; no receipt was indorsed on the
ed; the Defendants swear they executed it merely as
ticles of agreement, and I think the fair construction
the transaction is, that it was not intended to be consi-
red as a conveyance. *Mrs. Hayes* and her son swear
sitively that they did not know they were executing a
veyance of the lands, and they also swear that *O'Brien*
ed as much on the part of the Plaintiff in the transac-
n as for them. The agreement seems to have been en-
ed into upon an erroneous view of the objects and
hts of the parties.

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v.
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Judgment.

No damage will result to the purchaser, except, perhaps,
a loss he may sustain in consequence of having filed this
l: for if he obtained relief in this suit, it would only be upon
yment of the purchase-money, which exceeds the value of
e lands, and as between him and the annuitants subject
50*l.* a year. There is no equity to deprive the *Ahearnes*
that annuity. The cases in which purchasers have
een protected from incumbrances upon the ground of
audulent representations by the owners of those incum-
rances, have no bearing upon the present. Here the pur-
chaser knew of the incumbrances, and prepared this deed
f indemnity to secure himself against them.

The transaction as to the sale between *Mrs. Hayes* and

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the *Ahearnes* was perfectly *bond fide*, the purchase-money was paid, and part of it applied to the purpose for which it was raised, the redemption of the evicted lands. The Plaintiff has, therefore, altogether failed to support his allegations that the transaction was a mere pretence and fraud. It is immaterial whether the *Ahearnes* had or had not full notice of the dealings between the Plaintiff and Mrs. *Hayes*, because those dealings were not complete. When the conduct of the purchaser, requiring an indemnity for which he had not stipulated, frustrated the whole object of the sale, must I not hold that the seller was at liberty to treat the transaction as incomplete, and to enter into a new contract of sale with another party?

Upon these grounds, therefore, the bill must be dismissed ; but, as I cannot approve of the dealings between the Defendants, I will not give any costs.

Reg. Lib. 88, fol. 133, 1843.

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TO

THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

ACCOUNT.

a bill prayed certain acts, and an injunction to restrain the Defendant from proceeding to an ejectment, on the ground one of the lives, upon which a depended, subsisted:—*Semble*, Court could not make such a decree, without a previous inquiry into the existence of the alleged sustaining life. *O'Donnell v. Noon*. 153

ACQUIESCENCE.

See CONFIRMATION.

ADEMPTION.

See SATISFACTION.

ADMINISTRATOR

See COSTS.

SOLICITOR.

AGENT.

In the year 1830, the Plaintiffs, who were four sisters, employed a common agent to receive their rents and manage their estate: one of the sisters only resided in this country, and the agent acted under a general power of attorney executed by the three who were resident abroad. In the year 1834, the agent granted to the Defendant (who acted as under-agent upon the estate) a lease of sixteen acres, and executed same in the name of the four Plaintiffs, "by virtue of the letter of attorney, bearing date," &c. At this period the agent was in embarrassed circumstances, and very shortly afterwards he absconded from the country. Upon a bill filed by the four sisters impeaching the lease;—*Held*, that it could not be sustained. *Rossiter v. Walsh*. 485

See CONFIRMATION.
SOLICITOR.

AMENDMENT.

The Plaintiff, who was a married woman, but had been deserted by her husband, when he left the country several years since, filed a bill as a *feme sole*, to enforce payment of a legacy bequeathed to her subsequently to the abandonment. There having been some evidence in the cause to shew that the husband was still alive, the Court at the hearing gave liberty to the Plaintiff to amend the bill, by adding a next friend, and making her husband a Defendant, and charging him to be out of the jurisdiction, and to have abandoned his wife. *Johnston v. Kirkwood.* 379

ANNUITY.

1. Upon the purchase of an annuity granted for two lives and the life of the survivor, and made redeemable upon six months' notice, a policy of insurance, which had been effected upon the life of one of the grantors, was assigned to the annuitant, and was subsequently kept up by her at her own expense. The life having dropped, the Company paid the amount of the insurance to the annuitant. The annuity having subsequently fallen into arrear, upon a bill filed by the annuitant to raise the arrears:—*Held*, that the annuitant was not

bound to give credit for the amount received on foot of the policy as against the arrears of the annuity; but was entitled to retain same as compensation for the diminution in value of the annuity. *Milliken v. Kidd.* 274

2. A vendor, being seised in fee of lands subject to annuities which she granted to an attorney, in consideration of advances made and costs incurred by him, agreed to sell the lands to the Plaintiff, stating to him that the grantee of the annuities would join in the conveyance. A deed of conveyance was executed by the vendor: the purchase-money was not paid, but part of it was deposited with the attorney who had acted for the vendor and the Plaintiff, to remain in his hands until the lands were discharged from the annuities. The Plaintiff then called on the vendor and the grantee of the annuities to execute a deed of indemnity, which the parties declined to do. The vendor subsequently sold the lands to the grantee of the annuities, who had actual notice of the Plaintiff's conveyance. On a bill filed to set aside the second sale:—*Held*, that the vendor was justified in treating the transaction between her and the Plaintiff as incomplete, and in selling to the grantee.

It was attempted to impeach the consideration of the annuities, but—*Seemle*, such a question was not open to the Plaintiff. *Leader v. Ahearne.* 495

ANSWER.

Trustees in the same interest may be allowed the costs of separate answers, if the Master shall find that the circumstances justified separate answers. *Dudgeon v. Corley*. 158

APPROPRIATION.

See LEGACY.

WILL.

ARTICLES.

- By indenture of marriage settlement, a power was given to the husband to appoint by deed or will the lands of Blackacre and Whiteacre, held under leases for lives renewable for ever, to any of the sons of the marriage, for any estate not exceeding an estate *quasi* in tail male. The husband made his will, and after reciting the power, in express execution thereof, devised the lands of Blackacre to a trustee to the use of his third son, *M.*, for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of *M.*, in succession; and in default of such issue remainder over to the testator's sixth son, *N.*; and the testator then devised Whiteacre to his said sixth son, *N.*, for life, remainder to trustees to preserve, &c.; remainder to *N.*'s first and other sons, with remainders over. The donee of the power afterwards, by a codicil to his will, directed, that in the event of the

decease of his eldest son without issue, the limitation of Whiteacre to *N.* should cease, and the lands should shift over to *M.* in tail male.

M., the third son, married in 1815, and by the deed of settlement then executed, after recitals of *M.*'s vested estate in Blackacre, and contingent interest in Whiteacre, all the lands were limited to *M.* for life, remainder to the first and other sons of the marriage in tail male, remainder, as to Whiteacre, to the daughters of the marriage, remainder, as to Blackacre, to *N.*, the sixth son, for life, remainder to his first and other sons in tail, with similar limitations to his brothers and their issue.

In 1816, the eldest son of the donee of the power died without issue, whereupon *M.* became entitled unto, but did not obtain possession of, Whiteacre.

There were two sons, issue of *M.*'s marriage in 1815. In 1827, *M.* married a second time, and by the articles, which were executed upon that occasion, he covenanted to settle the reversion, expectant upon the decease of his sons without issue, in all the lands, to the use of the first and other sons of that marriage in tail male, with remainder to the daughters of the marriage as tenants in common in fee. There was issue of this marriage, two daughters. The survivor of the sons, the issue of the

first marriage, died in 1840, under age and unmarried; *M.* their father, having died in 1835.

In 1841, a bill was filed by the daughters of *M.*, claiming both Blackacre and Whiteacre:—*Held*, that the remainders limited by the deed of 1815 to the brothers of the settlor, were merely voluntary, and that the Court would give effect to the articles of 1827, even against a legal estate vested in persons deriving under those voluntary limitations.

Held, accordingly, that the daughters of *M.* were entitled to Blackacre. *Stackpoole v. Stackpoole.* 320

2. By articles executed upon the marriage of *A.* and *B.*, it was provided that the survivor should, in case of issue, leave to said issue two-thirds of whatever property might remain, retaining one-third; or, to be more specific, that *A.* should settle upon any children he might have by *B.* two-thirds of the property he might possess, in case he survived her, and that *B.* should be equally bound to settle and hand over to any children she might have by *A.*, two-thirds of any property remaining at the time. There was issue one child, and *B.*, the wife, having survived:—*Held*, that she was entitled to one-third of all the property of which *A.* died possessed. *M'Donnell v. M'Donnell.* 376

See POWER OF SALE.

TRUST AND TRUSTEE.

ATTORNEY.

See CONFIRMATION.

SOLICITOR.

BANKRUPT.

1. A trader confessed a judgment to *A.* and executed a mortgage to *B.*; the execution of the deed of mortgage was subsequent to the entering up of the judgment. The trader afterwards became a bankrupt:—*Held*, that the mortgage was to be paid in the first instance, and that the judgment was within the operation of the Statute 6 Will. IV., c. 14, sec. 126.

The case of a mortgage creditor stands on altogether a different footing from that of a purchaser. *White v. Baylor.* 297

2. Where a mortgagee unnecessarily files a bill for foreclosure, subsequently to the bankruptcy of the mortgagor, he will not get more costs than he would have been entitled to by proceeding in the matter of the bankruptcy. *Hogan v. Baird.* 296

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TRUST AND TRUSTEE.

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PORTIONS.

SATISFACTION.

OF DEBTS UPON
REAL ESTATE.

debted to her law agent
able sum for costs, and
omissory note, by her
, in the first instance,
o be paid as soon as
might be after her
e then devised her real
brother, and directed
sts and charges which
e to her law agent" at
her decease should be
r brother out of the
e real estate. *A. B.*
}.—*Held*, that the real
arged with the amount
ssory note, as well as
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303.

CHARITY.

the year 1690, by his
and bequeathed certain

properties therein mentioned for
charitable purposes, but without
naming any trustee or devisee.
From the death of the testator to
the present time the property was
applied upon the trusts in the will
specified. Upon a petition presented
under the Statutes 52 Geo. III., c
101, and 1 Will. IV., c. 60, stating
such facts, and that the heir of the
testator could not be discovered,
the Court made an order, refer-
ring it to the Master to appoint
new trustees and to approve of a
proper person in the place of the
son of the testator to convey to
such new trustees. *In the matter
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CLASS.

Where there is a gift to a class of per-
sons, and an inquiry becomes ne-
cessary, to ascertain the persons
entitled; the settled rule of the
Court is, to send it to the Master
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are individuals constituting that
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CONFIRMATION.

1. A tenant in tail by indenture of set-
tlement, executed upon the occasion

of the marriage of his eldest son, reciting that he was seised in fee or in tail, conveyed the lands, as if he was seised in fee, to trustees, for a term of 100 years, to secure a jointure for the intended wife of his son, in case certain other lands, on which it was primarily charged, should be sold, and subject to said term to the use of himself for life; remainder to trustees, for a term of 200 years, to raise portions for his younger children, and subject thereto to the use of his son for life; remainder to trustees, to preserve, &c.; remainder, subject to a third term of 300 years, to the first and other sons of his son in tail. No fine, recovery, or disentailing deed was levied, suffered, or executed by the father or by the son. A bill was filed to raise the portions for the younger children of the father, the settlor, and a decree was pronounced, directing a sale of the term of 200 years. After the decree, the eldest son of the marriage, his grandfather being then dead, executed a disentailing deed, and subsequently, his father having died in the interval, conveyed the lands in fee, expressly subject to the term, to a stranger to the suit, by whom shortly afterwards the fee was conveyed to the widow of the father, who was a party to the suit, and against whom a decree upon sequestration had been obtained:—*Held*, that the acts of the eldest son operated as a confirmation of the settlement. *Massey v. Batwell*.

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2. *A.* shortly before his death stated to the Defendant, who was his solicitor and land agent, that he intended to make him a present of 300*l.*, and subsequently, being taken suddenly ill, he sent for the Defendant and desired him to retain that sum out of the balance in his hands. There was no third person present on either of those occasions, and on the day following the last conversation *A.* died. Upon the death of *A.*, in 1831, the Defendant informed *A.*'s executors of the gift, and assisted them in making out an account of the testator's assets, in which account the 300*l.* was treated as a gift by the testator in his lifetime; and in the inventory returned to the Ecclesiastical Court, and in the account settled in the Stamp Office, a like credit was taken.

In 1832, the Defendant, at the request of one of the executors, furnished an account, in which, among other things, he stated all the circumstances under which he claimed to be entitled to this sum of 300*l.*, taking credit for it against the balance in his hands, and seeking to retain the residue of said balance in discharge of certain costs due to him and his partner in a suit in the Exchequer, in which he had been employed for the testator in his lifetime, and after his death for the executors, the amount of which costs, however, had not been ascertained. This account was retained by the executors, without any ob-

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Valsh v. Studdart. 159

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firmation he had defeated his right
to sue on the covenant, and that
the benefit of the covenant was lost
to those entitled to estates in re-
mainder under the settlement.

Martyn v. M'Namara. 411

See DEED.

CONSENT.

See DECREE.

FEME COVERT.

PORTIONS.

CONSTRUCTION.

See CONTRIBUTION.

COVENANT.

DEED.

GENERAL ORDERS.

LEGACY.

POWER OF SALE.

REMAINDER.

WILL.

CONTINGENT REMAINDER.

See REMAINDER.

CONTRACT.

1. *A.* being entitled to the freehold
lands of Blackacre and Whiteacre,
in 1806 granted the former in
mortgage, to secure an advance of
1000*l.*, and at the same time exe-
cuted a collateral bond, upon which
judgment was duly obtained, in
Easter Term, 1806. This judg-
ment was not revived until 1839,
and was never redocketed under
the 9 Geo. IV., c. 35. In 1829,
A. granted to *B.* an annuity of
400*l.*, charged upon Whiteacre,

and in 1833 died, having devised Whiteacre, subject to an annuity, to his wife, and all his other property to two trustees, upon trust to sell, and, after payment of his debts, to make an equal distribution thereof among his younger children. One of the trustees died in his lifetime, and the other refused to act. In 1834, there being a considerable arrear of head-rent due upon Whiteacre, and the head landlord having brought an ejectment, *B.* paid off the arrear of rent, and the costs of the ejectment, and subsequently entered into a contract with the younger children for the purchase of Whiteacre, but died without having completed same; his widow and executrix, the principal Defendant, however, afterwards adopted the contract, and by a deed of the 29th of February, 1840, Whiteacre was conveyed by the younger children to the Defendant, *habendum* to her, her heirs and assigns, free from all incumbrances, except three judgments, one of which was the judgment of 1000*l.* above mentioned, and the annuity of 400*l.* The covenant in the deed against incumbrances, however, was general. The surviving trustee of the will, though named a party in the deed, never executed it. On a bill filed by the Plaintiff, who was entitled to the mortgage of 1806, and the judgment collateral, alleging that Blackacre was insufficient, and seeking to make good the deficiency,

by means of the judgment, out of Whiteacre:—*Held*, that as the sale of Whiteacre was by the younger children, it was only the residue after payment of the debts that was sold, and that, consequently, the lands in the possession of the Defendant were, notwithstanding the provisions of the Statute 9 Geo. IV. c. 35, liable to the judgment. *Garnett v. Armstrong.* 182

2. A vendor being seised in fee of lands subject to annuities, which she had granted to an attorney in consideration of advances made and costs incurred by him, agreed to sell the lands to the Plaintiff, stating to him, that the grantee of the annuities would join in the conveyance. A deed of conveyance was executed by the vendor: the purchase-money was not paid, but part of it was deposited with the attorney who had acted for the vendor and the Plaintiff, to remain in his hands until the lands were discharged from the annuities. The Plaintiff then called on the vendor and the grantee of the annuities to execute a deed of indemnity, which the parties declined to do. The vendor subsequently sold the lands to the grantor of the annuities, who had actual notice of the Plaintiff's conveyance. On a bill filed to set aside the second sale:—*Held*, that the vendor was justified in treating the transaction between her and the Plaintiff as incomplete, and in selling to the grantee.

as attempted to impeach the
ration of the annuities, but :
ble, such a question was not
o the Plaintiff. *Leader v.*
ne. 495

See DOWER.

CONTRIBUTION.

r gave his farm of A., with the
nd one-third of his residuary
y to his grandson X., and his
of B. and C., with the re-
g two-thirds of the residue
property, to his grandsons Y.
, and bequeathed to his wife
uity to be paid to her during
, by his said three grand-
hare and share alike. The
of A., B., and C. were held
terminable leases, and the
r declared, that his said
ons, or their heirs, "on the
any lease, were to be equal
rs, pursuant to their respec-
roportions." The testator,
time of making his will, and
time of his death, was also
for two lives of the farm of
cre, which passed under the
part of his residuary pro-

—
l, that on the fall of the leases
which A., B., and C. were
purchaser of Blackacre would
liable to a demand for con-
n; for that the true con-
na of the clause, declaring
e grandsons were to be equal
s on the fall of any lease,

was that, which confined its opera-
tion to the leases specifically men-
tioned and devised by the will.
Spunner v. Dwyer. 477

CONVEYANCE.

See DEED.

LEASE AND RELEASE.

COSTS.

1. Discussion of the principles upon
which the Court acts in directing
the taxation of a solicitor's bill of
costs, after the payment thereof.

A firm of solicitors were em-
ployed by an administrator, to re-
cover a debt due to his intestate,
and they had a power of attorney
from the administrator, who was
resident in England, authorizing
them to receive monies, and to act
generally for him in all matters
connected with the affairs of the
administration. The solicitors paid
over to the administrator certain
sums, which they received during
the course of the proceedings, and
retained the residue in payment of
their costs; the costs were not de-
livered to the administrator during
his life-time, but after his death,
an account was furnished to his
executors, by the solicitors, setting
forth these costs, and applying in
payment thereof the sums which it
appeared they had retained out of
the sums paid to them in the course
of the proceedings, and from which
it appeared that the costs incurred

exceeded the sum retained by a sum of about 10*l*. In this account the executors acquiesced, although it did not appear that there ever had been any formal settlement of it; and there was no taxation of the costs:—*Held*, affirming the order of the Master of the Rolls, that an administratrix *de bonis non* of the intestate, was entitled to have the bill referred for taxation; and, that under the circumstances, the settlement with the executors of the deceased was not a bar to such right.

If a trustee employs a solicitor, in relation to the trust estate, and pays him the amount of his costs without taxation, the *cestui que trust* cannot require a taxation of the bill against the solicitor; but in the settlement of accounts with the trustee, he is entitled to have the bill of costs referred to be moderated; and upon such a reference the Master will revise the items in a way similar to taxation; and if the charges appear to be improper, they will be disallowed to the trustee, and he will be left to his remedy over against the solicitor.

Langford v. Nott (1 Jac. & W. 291) is overruled by the cases of *Balme v. Paver* (Jacob, 305), and *Vincent v. Venner* (1 Mylne & K. 202). *Lady Langford v. Mahony*.

81

2. Trustees in the same interest may be allowed the costs of separate answers, if the Master shall find

that the circumstances justified separate answers. *Dudgson v. Corley*.

158

3. A party served with a notice of motion, though not interested in the subject matter of the motion, is yet entitled to the costs of appearing. *Tabuteau v. Warburton*.

267

4. When a mortgagee unnecessarily files a bill of foreclosure, subsequently to the bankruptcy of the mortgagor, he will not get more costs than he would have been entitled to by proceeding in the matter of the bankruptcy. *Hogan v. Baird*.

296

COUNSEL.

Counsel acting for a minor heir at law, are justified in exercising their discretion, whether or not he ought to take an issue of *devisavit vel non*. *Knipe v. M. Mahon*.

295

COVENANT.

By marriage settlement, Blackacre and Whiteacre were expressed to be conveyed to trustees by *A.* the father of *B.*, the intended husband. At the time of the settlement *A.* was not in possession of Blackacre; his title was disputed, and ultimately defeated. Whiteacre was held under leases for lives, and was subject to head rents. The settlement contained a provision, that in case *A.* should purchase the head rents of Whiteacre, they should be

subject to the trusts of the settlement, and *A.* should have power to charge the property so purchased with the amount of the purchase-money. By the settlement, *A.* covenanted with the father of the intended wife for good title generally, and *A.* and *B.* covenanted with the trustees for good title, notwithstanding any act done by them.

A. purchased the head rents, charged the amount of the head rent on the property, and by a voluntary deed appointed the charge to his daughter.

Semble, the general covenant for good title with the father of the intended wife, was, in construction, to be cut down by the limited covenants with the trustees, and that therefore the defeazance of *A.*'s title to Blackacre was not a breach of covenant.

Held, that even though there was a breach of the general covenant, yet the appointment of the charge to the daughter was valid as against the parties entitled to damages in consequence of that breach, it not having been proved that *A.* was indebted to the extent of insolvency, at the time of the appointment.

B. by deed confirmed the appointment to the daughter, and was the personal representative of the covenantor:—*Held*, that by his confirmation, he had defeated his right to sue on the covenant, and that the benefit of the covenant was lost to those entitled to estates in re-

mainder under the settlement.

Martin v. M'Namara. 412

See CONTRACT.

DOWER.

CREDITORS.

See CESTUI QUE TRUST.

INTEREST.

MORTGAGE.

RECEIVER.

CY PRES.

See PORTION.

POWER.

DECREE.

1. A tenant in tail, by indenture of settlement, executed upon the occasion of the marriage of his eldest son, reciting that he was seized in fee or in tail, conveyed the lands, as if he was seized in fee, to trustees for a term of 100 years, to secure a jointure for the intended wife of his son, in case certain other lands, on which it was primarily charged, should be sold; and subject to said term, to the use of himself for life, remainder to trustees for a term of 200 years, to raise portions for his younger children, and subject thereto to the use of his son for life, remainder to trustees to preserve, &c., remainder, subject to a third term of 300 years, to the first and other sons of his son in tail. No fine, recovery, or

disentailing deed was levied, suffered, or executed by the father or by the son. A bill was filed to raise the portions for the younger children of the father, the settlor, and a decree was pronounced, directing a sale of the term of 200 years.

After the decree, the eldest son of the marriage, his grandfather being then dead, executed a disentailing deed, and subsequently, his father having died in the interval, conveyed the lands in fee expressly subject to the term, to a stranger to the suit, by whom, shortly afterwards, the fee was conveyed to the widow of the father, who was a party to the suit, and against whom a decree upon sequestration had been obtained.

The term was sold, and the purchaser objected to the title; but the title was held good by the Master of the Rolls, and afterwards, upon appeal, by the Lord Chancellor.

Held, also, that the acts of the eldest son operated as a confirmation of the settlement.

Held, also, that the widow of the father having acquired her title after the decree, was bound out of that title to give effect to the decree.

Massy v. Batwell. 58

2. A decree stated, that a Defendant "waived all right of priority against the Plaintiff":—*Held*, that the Court could not, upon motion, restrict the force of such comprehensive words, notwithstanding that it

was represented, that these words were introduced in relation to a particular right of priority only. *Sheehy v. Muskerry* (7 Clark & F. 1), observed upon. *Drought v. Jones.* 174

3. By the decree in the cause, the Plaintiff's right, under a settlement of the year 1804, to two-thirds of certain lands, was established, subject to the leases subsisting at the time of the settlement. *A.* a third party, claiming a portion of these lands as a purchaser for valuable consideration, and without notice, under a lease made in the year 1831, by one of the Defendants, *C.*, who was entitled to the remaining one-third, applied after the decree, and upon undertaking to be bound by all the proceedings in the cause, he obtained an order, upon consent, that the Master should inquire and report, whether he was entitled to any estate or interest in the lands in the decree mentioned:—*Held*, that under this order, he could not set up his claim under the lease of 1831, against the Plaintiff, whose title had been established by the decree, and that he was not entitled to have the order varied or discharged, to enable him so to do.

The Court cannot relieve against a decree or order made upon consent, unless in case of misrepresentation.

A decree cannot be varied upon motion, without consent. *Peed v. Cussen.* 199

4. The Plaintiff is not entitled as of course, to a decree against a party, as to whom the bill has been taken *pro confesso*. He is bound to make out his case and establish his right to the relief sought. *Lloyd v. Lloyd*. 358

DEED.

- By a settlement, lands were limited to trustees, to the use of the settlor for life, with remainder, subject to a term of ninety-nine years, to the use of his three daughters, for their lives, as tenants in common, with remainder to trustees, during the life of each daughter, to preserve contingent remainders, with remainder as to the share of each daughter, at her death, to the use of her first and other sons successively in tail male, with remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivor or survivors during their or her respective lives and life, with remainder, in like manner, as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male, with remainder, in case all the daughters should die without issue male, as to the share of each, to the use of the daughters as tenants in common in tail; and in case one or more of the daughters should die without issue, it was provided, that the share or shares of such daughter or daughters, should go to the use of the

daughters of such survivors or survivor, as tenants in common in tail general: the ultimate remainder was limited to the use of the settlor in fee:—

Held, that the limitation in case of the failure of issue generally of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and not void for remoteness.

Held, also, that the words “survivors or survivor,” were to be read “other or others,” and, consequently, that the limitation over to the daughters of one of the settlor’s daughters, who had issue, was not defeated by the death of that daughter in the life-time of another, who subsequently died without issue, but that the limitation took effect as a good cross remainder.

A limitation by way of remainder cannot be void for remoteness.

General powers of sale and exchange in a settlement are good.

Cole v. Sewell. 1

2. By a deed of settlement, executed on the occasion of the marriage of *B.*, certain lands, of which *A.*, the father of *B.*, was seised, as tenant for life, were conveyed to trustees, in trust to pay *B.* an annuity during the life of *A.*; and certain other lands, to which *A.* was absolutely entitled, were also conveyed, upon trust to permit *A.*, and his heirs and assigns, to receive the rents and profits thereof during *B.*’s (the son’s) life, and subject thereto,

to secure a jointure of 300*l.* for the son's intended wife, and to raise a sum of 4000*l.* as portions for the younger children of the marriage; and it was provided, that these portions should be divided among the younger children, in such shares and proportions as *B.* should appoint, and in default of appointment, share and share alike, and should be payable to such of them as should be sons, at their ages of twenty-one years, and to such of them as should be daughters, at their ages of twenty-one years, or days of marriage, which should first happen, "if such respective times of payment should happen after the death of *B.*, but if before, then within three calendar months after the death of the said *B.*, and not before, or sooner, unless with the consent of the said *A.*, if living, and if dead, of the said *B.*, testified in writing under their respective hands and seals."

B., after the death of his father, *A.*, in pursuance of the power contained in this settlement, executed an appointment in favour of the Plaintiff, who was one of his younger children, and who had attained her age of twenty-one years, and directed such portion to be raised and paid to her forthwith.

Upon a bill filed to raise the amount thereof:—*Held*, that the settlement authorized *B.*, the son, after the death of his father, to

charge the lands with the portion in question, and to direct its immediate payment. *Kelly v. Kelly*.

3. *A.* being indebted to the Plaintiff in a sum of 400*l.*, and being entitled to a life estate in certain leasehold premises, conveyed, by deed of the 21st of November, 1837, his life interest therein to trustees, upon trust, "out of the interest, proceeds, or annual rents thereof," to pay the head rent to which the lands were subject, the premiums of insurance on a certain policy of insurance (which *A.* had effected upon his life, and which policy was assigned by a separate deed), and also to the said Plaintiff the said sum of 400*l.*, with legal interest, from the date thereof, at the rate of 6*l.* by the year, until the same should be fully paid off and discharged, and upon payment thereof, to reconvey the same to *A.* or his assigns. The deed did not contain any covenant for payment on the part of *A.*:—*Held*, upon the true construction of the deed of November, 1837, that the Plaintiff was not to be considered as mortgagee, or entitled to a sale, but only to have a receiver, and the trusts of the deed carried into execution under the direction of the Court. *Taylor v. Emerson*.

117

4. By a marriage settlement of the 9th of May, 1789, certain real estates, the property of the hus-

band, were limited in trust for him for life, and after his decease to trustees, for a term of 1000 years, and subject thereto, to the first and other sons of the marriage, with remainder to the husband in fee. The trusts of the term, which were for raising a sum of 8000*l.* as portions for the younger children of the marriage, were declared to take effect in case there should be one or more child or children of the said marriage, besides an eldest or only son.

There was no son of the said marriage, but only two daughters. Upon the occasion of the marriage of one of the daughters, the father covenanted to settle upon herself and her husband, and their issue, an annuity of 500*l.* per annum, and subsequently conveyed, in fulfilment of this covenant, a portion of the lands which were the subject of the settlement of 1789, to trustees for a term of 300 years, to secure same. Upon the marriage of the second daughter, the father made a pecuniary provision for her, which was expressly declared to be in satisfaction of her portion under the settlement. The father, by his will, devised the estates, which were the subject of the settlement of 1789, to his two daughters, in the same manner as they would have come to them, if he had died intestate:—

Held, upon the true construction of the settlement, that as there was

no son of the marriage, the portions were not raisable. *Wallcott v. Bloomfield.* 211

5. By articles executed upon the marriage of *A.* and *B.*, it was provided, that the survivor should, in case of issue, leave to said issue two-thirds of whatever property might remain, retaining one-third; or, to be more specific, that *A.* should settle upon any children he might have by *B.* two-thirds of the property he might possess, in case he survived her, and that *B.* should be equally bound to settle and hand over to any children she might have by *A.*, two-thirds of any property remaining at the time: there was issue one child; and *B.*, the wife, having survived:—

Held, that she was entitled to one-third of all the property, of which *A.* died possessed. *M'Donnell v. M'Donnell.* 376

See ANNUITY.

CONTRACT.

COVENANT.

DOWER.

LEASE AND RELEASE.

MERGER.

PORTIONS.

DESCENT.

See ESTATE.

DEVISE.

See LEGACY.

POWER.

WILL.

DONATIO MORTIS CAUSA.

1. *A.*, shortly before his death, stated to the Defendant, who was his solicitor and land agent, that he intended to make him a present of 300*l.*, and subsequently, being taken suddenly ill, he sent for the Defendant, and desired him to retain that sum out of the balance in his hands. There was no third person present on either of those occasions, and on the day following the last conversation *A.* died. Upon the death of *A.*, in 1831, the Defendant informed *A.*'s executors of the gift, and assisted them in making out an account of the testator's assets, in which account the 300*l.* was treated as a gift by the testator in his life-time, and in the inventory returned to the Ecclesiastical Court, and the account settled with the Stamp Office, a like credit was taken.

In 1832, the Defendant, at the request of one of the executors, furnished an account, in which, among other things, he stated all the circumstances under which he claimed to be entitled to this sum of 300*l.*, taking credit for it against the balance in his hands, and seeking to retain the residue of said balance, in discharge of certain costs due to him and his partner in a suit in the Exchequer, in which he had been employed, for the testator in his life-time, and after his death for the executors, the amount of which costs, however, had not

been ascertained. This account was retained by the executors without any objection. Upon a bill filed by the executors in 1839, against the Defendant, for an account of the sums due by him as agent to the estate of the testator :—

Held, that the gift of the 300*l.* could not be supported; that the executors had not confirmed said gift, and were not precluded by any acquiescence from disputing same. *Walsh v. Studdart.* 159

2. Where a disposition of money is attempted to be supported as a *donatio mortis causa*, a mere general statement of the fact of a gift having been made is not sufficient; the Court requires to be informed of the most minute particulars, how, and where, and in whose presence the gift was made, and in what condition of mind and body the alleged donor was.

It is essential to the validity of a *donatio mortis causa*, that the money, or the subject of the gift, should be actually handed over at the time. *Thompson v. Heffernan.*

285

DOWER.

- A.* being equitable tenant in tail of certain lands, some of which were fee-simple, and some held under leases *pur autre vie*, during the life-time of his father, the prior tenant for life, and before he obtained the actual possession of said

lands, sold a portion of the leasehold interests, and by a contemporaneous deed conveyed the fee-simple lands to the purchaser, by way of indemnity against all incumbrances affecting the purchased lands. *A.*, at the period of this transaction, was married to the Plaintiff; but no settlement had been executed upon the occasion of the marriage. In 1808, upon the death of his, *A.*'s, father, the legal fee descended upon *A.* In 1810, by a further deed executed between *A.*, of the one part, and trustees, in whom the estate of the vendee in the sale of 1804 was vested, of the other part, *A.* covenanted that in case the purchased lands should be made liable to pay the amount of the incumbrances affecting same, the trustees should be at liberty to resort to the indemnity lands, to be recouped thereof in all such sums, with interest and costs. In 1813, *A.* and his wife, the Plaintiff, executed a deed, whereby, after reciting that the Plaintiff had agreed to levy a fine to discharge her right of dower, and that *A.* had agreed to secure her a jointure or rent-charge in lieu thereof, *A.* conveyed the said indemnity lands and others, to the use of himself, his heirs, and assigns, discharged of all estates tail and of dower; and by the said deed he charged the said lands with an annuity of 200*l.* per annum, by way of jointure. *A.* having subsequently

died, and the lands charged with the jointure having proved insufficient, in consequence of prior incumbrances, the bill in the present cause was filed by the Plaintiff, praying that she might be declared entitled to dower out of all the estates of which *A.* was seized during the coverture, except such as had been sold subsequently to the deed of 1813.

Held, that as against the parties deriving under the vendee in the sale of 1804, that the Plaintiff's claim could not be sustained; but that as against the heir-at-law of *A.* she was entitled to a decree.

If a man, before marriage, enter into a contract for the sale of his fee-simple estate, his subsequent marriage does not, in Equity, create any right of dower. *Lloyd v. Lloyd.* 354

ESTATE.

By a marriage settlement of the 9th of May, 1789, certain real estates, the property of the husband, were limited in trust for him for life, and after his decease to trustees, for a term of 1000 years, and subject thereto, to the first and other sons of the marriage, with remainder to the husband in fee. The trusts of the term, which were for raising a sum of 8000*l.* as portions for the younger children of the marriage, were declared to take effect in case there should be one or more child

or children of the said marriage, besides an eldest or only son.

There was no son of the said marriage, but only two daughters. Upon the occasion of the marriage of one of the daughters, the father covenanted to settle upon herself and her husband, and their issue, an annuity of 500*l.* per annum, and subsequently conveyed, in fulfilment of this covenant, a portion of the lands which were the subject of the settlement of 1789, to trustees for a term of 300 years, to secure same. Upon the marriage of the second daughter, the father made a pecuniary provision for her, which was expressly declared to be in satisfaction of her portion under the settlement. The father, by his will, devised the estates, which were the subject of the settlement of 1789, to his two daughters, in the same manner as they would have come to them if he had died intestate:—

Held, upon the true construction of the settlement, that as there was no son of the marriage, the portions were not raisable.

Semble, that even if the portions were raisable, the gift of the annuity to the daughter would have operated as a satisfaction of her share.

Semble, that after the descent of the estates upon the two daughters, neither could support a claim against her sister's lands for her share of the portions.

The case of *Church v. Edwards* (2 Bro. C. C. 180), approved of *Wallcott v. Bloomfield*. 211

See ARTICLES.

CHARGE OF DEBTS UPON
REAL ESTATE.

CONFIRMATION.

FINE.

POWER OF SALE.

REMAINDER.

VENDOR AND PURCHASER.

ESTOPPEL.

See LEASE AND RELEASE.

FEME COVERT.

1. The Plaintiff, who was a married woman, but had been deserted by her husband, when he left the country several years since, filed a bill as *feme sole* to enforce payment of a legacy bequeathed to her subsequently to the abandonment. There having been some evidence in the cause to show that the husband was still alive; the Court at the hearing gave liberty to the Plaintiff to amend the bill by adding a next friend, and making her husband a Defendant, and charging him to be out of the jurisdiction, and to have abandoned his wife. *Johnston v. Kirkwood*. 379
2. By a post-nuptial settlement, the husband executed his bond to trustees, upon trust, in case the wife should happen to survive him, to raise the sum of 1000*l.*, and pay

Over the same to the said wife, to be by her disposed of as she might think proper; but in case the said husband should in her life-time pay the said sum to the said trustees, then upon trust to invest same and pay the interest thereof to the husband for his life, and, after his decease, to pay the principal and all interest due thereon to the wife, for her sole and separate use. Shortly after the execution of this deed, the husband paid the 1000*l.* to the trustees, who thereupon invested same. The husband and wife subsequently filed a bill seeking to have the fund transferred to the husband absolutely, the wife offering to waive her interest in the fund:—*Held*, that as the interest which the wife had, depended upon the contingency of her surviving her husband, the Court could not, upon her consent, order the transfer sought for. *Batt v. Cuthbertson*. 392

FINE.

If a tenant in tail create an incumbrance, or convey his estate by a voidable conveyance, and afterwards levy a fine, though for a different purpose, the first operation of the fine will be to give effect to the antecedent act.

The same rule has been extended to the case of an equitable charge. *Lloyd v. Lloyd*. 354

FORECLOSURE.

See BANKRUPT.

COSTS.

MORTGAGE.

FORFEITURE.

See RENEWAL.

WAIVER.

GENERAL ORDERS.

1. This Court will not allow a receiver, who has not accounted within the time prescribed by the 148th General Order, his poundage, upon a consent signed by the guardians of the minors interested in the fund. *Dease v. Reilly*. 284
2. It is not imperative upon the Plaintiff, under the 47th General Order, to set down the cause to be heard upon an objection for want of parties. If the objection be untenable he may disregard it. *Whitla v. Halliday*. 267

GIFT.

Where there is a power to appoint to and amongst children, though there is no appointment, nor any gift in default of appointment, yet by an implication arising from the terms of the power, there is a gift to the children living at the death of the donor as tenants in common. *Alloway v. Alloway*. 380
See DONATIO MORTIS CAUSA.

GIFT OVER.

A testatrix bequeathed a sum of 300*l.* to her executors, in trust to place the same out at interest, and pay same, as it should fall due, to her nephew for life, and at his decease "to divide the said sum and any interest which might be due thereon amongst his children equally, and if he should have but one, then to give the whole to said one child." There were two children of the nephew, both of whom died in his life-time:—*Held*, that this was a gift to the father for life, with remainder to the children as tenants in common, with a gift over, in case there should be but one surviving child, to that child; and that, as that event had not happened, the representative of the deceased children was entitled to the fund. *Kimberly v. Tew.* 139

HEIR.

See COUNSEL.

INFANT.

HUSBAND AND WIFE.

See AMENDMENT.

CLASS.

FEME COVERT.

INFANT.

Counsel acting for a minor heir at law are justified in exercising their discretion, whether or not he ought to take an issue of *devisavit vel non*. *Knipe v. M. Mahon.* 295

INSURANCE.

Upon the purchase of an annuity granted for two lives and the life of the survivor, and made redeemable upon six months' notice, a policy of insurance, which had been effected upon the life of one of the grantors, was assigned to the annuitant, and was subsequently kept up by her at her own expense. The life having dropped, the Company paid the amount of the insurance to the annuitant. The annuity having subsequently fallen into arrear, upon a bill filed by the annuitant to raise the arrears:—*Held*, that the annuitant was not bound to give credit for the amount received on foot of the policy, as against the arrears of the annuity; but was entitled to retain same as compensation for the diminution in value of the annuity. *Milliken v. Kidd.* 274

INQUIRY.

See ACCOUNT.

CLASS.

MASTER.

INTEREST.

In the year 1818 *A.* entered into a contract with *B.* for the purchase of four denominations, and made an advance of 2000*l.* on account of the purchase-money. The treaty having been broken off, *A.* became an incumbrancer to the extent of the advance. In 1819, upon the occasion of the marriage of *B.*, by in-

denture of settlement, the four denominations were conveyed to trustees, as to two of them, to the uses of the marriage, in strict settlement; and as to the remaining two, upon trust to sell, whenever the settlor should require the trustees so to do, and apply the produce in payment of the several incumbrances enumerated in the schedule of the deed. *A.* was the third incumbrancer mentioned in the schedule, but neither he nor any of the other incumbrancers were parties to the deed. There never was any sale pursuant to the trusts of the deed:—

Held, that interest on *A.*'s incumbrance was to be computed from the period of six years prior to the filing of the bill. *Law v. Bagwell.* 398
See LIMITATIONS, STATUTE OF.
 PORTIONS.

ISSUE.

See REMAINDER.
 SURVIVOR.

JOINT TENANT.

A testator, by his will, charged his estates with 6000*l.*, and directed "same to be paid to and among such of my younger children, as shall survive my said wife, in such shares and proportions, and at such times after her death, as she shall direct by her will or deed." His wife, by her will, directed as follows: "*Robbert* (the inheritor) give
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3 of the 6000*l.* I wish to have given, to the two elder girrels:—" *Held*, that the appointees of the 3000*l.* took as tenants in common, and not as joint tenants.

The power in this case was not a mere power of selection. The donee had the power of settling the fund to and amongst the children in any way she thought proper, and if she had intended to create a joint tenancy she had power to do so. *Alloway v. Alloway.* 380

See POWER.

TENANT IN COMMON.

JOINTURE.

See DOWER.

JUDGMENT.

1. A tenant in tail, by indenture of settlement, executed upon the occasion of the marriage of his eldest son, reciting that he was seised in fee or in tail, conveyed the lands, as if he was seised in fee, to trustees for a term of 100 years, to secure a jointure for the intended wife of his son, in case certain other lands, on which it was primarily charged, should be sold; and, subject to said term, to the use of himself for life, remainder to trustees for a term of 200 years, to raise portions for his younger children, and subject thereto to the use of his son for life, remainder to trustees to preserve, &c., remainder, subject to a third term of 300

years, to the first and other sons of his son in tail. No fine, recovery, or disentailing deed was levied, suffered, or executed by the father or by the son. A bill was filed to raise the portions for the younger children of the father, the settlor, and a decree was pronounced, directing a sale of the term of 200 years.

After the decree, the eldest son of the marriage, his grandfather being then dead, executed a disentailing deed, and subsequently, his father having died in the interval, conveyed the lands in fee expressly subject to the term to a stranger to the suit, by whom, shortly afterwards, the fee was conveyed to the widow of the father, who was a party to the suit, and against whom a decree upon sequestration had been obtained.

The term was sold, and the purchaser objected to the title; but the title was held good by the Master of the Rolls, and afterwards, upon appeal, by the Lord Chancellor:—

Held, that certain judgments obtained against the eldest son of the marriage, pending suit, did not create any objection to the title.

Massy v. Batwell.

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2. *A.* being entitled to the freehold lands of Blackacre and Whiteacre, in 1806 granted the former in mortgage, to secure an advance of 1000*l.*, and at the same time executed a collateral bond, upon which judgment was duly obtained, in

Easter Term, 1806. This judgment was not revived until 1829, and was never redocketed under the 9 Geo. IV., c. 35. In 1829, *A.* granted to *B.* an annuity of 400*l.*, charged upon Whiteacre, and in 1833 died, having devised Whiteacre, subject to an annuity, to his wife, and all his other property to two trustees, upon trust to sell, and, after payment of his debts, to make an equal distribution thereof among his younger children. One of the trustees died in his life-time, and the other refused to act. In 1834, there being a considerable arrear of head rent due upon Whiteacre, and the head landlord having brought an ejectment, *B.* paid off the arrear of rent, and the costs of the ejectment, and subsequently entered into a contract with the younger children for the purchase of Whiteacre, but died without having completed same; his widow and executrix, the principal Defendant, however, afterwards adopted the contract, and by a deed of the 29th of February, 1840, Whiteacre was conveyed by the younger children to the Defendant, *habendum* to her, her heirs and assigns, free from all incumbrances, except three judgments, one of which was the judgment of 2000*l.* above mentioned, and the annuity of 400*l.* The covenant in the deed against incumbrances, however, was general. The surviving trustee of the will, though named a party in the

deed, never executed it. On a bill filed by the Plaintiff, who was entitled to the mortgage of 1806, and the judgment collateral, alleging that Blackacre was insufficient, and seeking to make good the deficiency, by means of the judgment, out of Whiteacre:—*Held*, that as the sale of Whiteacre was by the younger children, it was only the residue after payment of the debts that was sold, and that, consequently, the lands in the possession of the Defendant were, notwithstanding the provisions of the Statute 9 Geo. IV., c. 35, liable to the judgment. *Garnett v. Armstrong*. 182

3. A trader confessed a judgment to A., and executed a mortgage to B.; the execution of the deed of mortgage was subsequent to the entering up of the judgment. The trader afterwards became a bankrupt:—*Held*, that the mortgage was to be paid in the first instance, and that the judgment was within the operation of the 6 Will. IV., c. 14, s. 126. *White v. Baylor*. 297

LACHES.

See LANDLORD.

LANDLORD.

1. Bill by the Plaintiffs, to have a lease of the year 1786 (which had been originally granted for the term of three lives, one of which

was stated to be still in existence), declared a subsisting one, dismissed, in consequence of the Plaintiffs not having established their title to the lease. *O'Donnell v. Nolan*. 153

2. Bill for the renewal of a lease for three lives, containing a covenant for perpetual renewal, by the trustees of a marriage settlement, to whom the lease had been assigned upon certain trusts, dismissed with costs, the right of renewal being held to have been forfeited in consequence of the laches and neglect of the parties interested.

Where such a lease is in settlement, it is the duty of the trustees to make full inquiry as to the existence of the lives, and the state of the property; and it is no answer to the landlord insisting upon the forfeiture, to say, that all the communications, which took place, were with the tenant for life, and that he alone ought therefore to be answerable for the delay. *Townley v. Bond*. 240

LEASE.

See AGENT.

DEED.

LANDLORD.

LEASE AND RELEASE.

A conveyance by lease and release does not operate by estoppel; *Right v. Bucknell* (2 B. & Adol. 278), overruling *Bensley v. Burdon* (2 Sim. & S. 519). *Lloyd v. Lloyd*. 354

LEGACY.

1. A testatrix bequeathed a sum of 300*l.* to her executors, in trust to place the same out at interest, and pay same, as it should fall due, to her nephew for life, and, at his decease, "to divide the said sum, and any interest which might be due thereon, among all his children equally; and if he should leave but one, then to give the whole to such one child." There were two children of the nephew, both of whom died in his lifetime:—

Held, that this was a gift to the father for life, with remainder to the children as tenants in common, with a gift over, in case there should be but one surviving child, to that child; and that as that event had not happened, the representative of the deceased children was entitled to the fund.

In this case, a particular fund, which had been set apart during the life of the tenant for life to answer the bequest, having risen in value, the Court held, that there had been such an appropriation of that fund in payment of the legacy, as to entitle the party to whom the legacy was now payable, to the benefit of the increase. *Kimberley v. Tew*. 139

2. A testator, by his will, charged his estates with 6000*l.*, and directed "same to be paid to and among such of my younger children as shall survive my said wife, in such shares and proportions, and at such

times after her death, as she shall direct by her will or deed." His wife, by her will, directed as follows: "*Robbert* (the inheritor), give 3 of the 6000*l.* I wish to have given, to the two elder girrels":—*Held*, that the appointees of the 3000*l.* took as tenants in common, and not as joint tenants.

The power in this case was not a mere power of selection. The donee had the power of settling the fund to and amongst the children in any way she thought proper, and if she had intended to create a joint tenancy she had power to do so. *Alloway v. Alloway*. 456

3. A testator gave a surplus fund, constituted of the accumulation of certain rents issuing out of freehold and leasehold estates, to be divided in equal parts amongst all his children living at his death.

By a codicil the testator revoked the gift to *W.*, one of the children:

Held, that the share which had been given by the will to *W.*, belonged to the other children, and did not devolve to the heir-at-law and next of kin of the testator.

Cresswell v. Cheslyn (2 *Eden*, 123), was well decided. *Shaw v. M^r Mahon*. 431

LEGAL ESTATE.

See VOLUNTARY DEED.

LIMITATIONS, STATUTE OF.

1. *A. B.* being indebted to her law agent in a considerable sum for

costs, and also on a promissory note, by her will ordered, in the first instance, her debts to be paid as soon as conveniently might be after her decease. She then devised her real estate to her brother, and directed "that all costs and charges which might be due to her law agent" at the time of her decease, should be paid by her brother out of the rents of the real estate. *A. B.* died in 1813. From the year 1815, the executors of the testatrix and the devisee of the real estate resided abroad, out of the jurisdiction of the Court; but in the year 1816 the law agent was paid, under an order of Court, in one of the causes in which the costs were incurred, a sum of 289*l.* 8*s.* 4*d.*, and subsequently the further sum of 100*l.* by the agent of the devisee of the real estate. In 1819 the law agent filed a bill against the executor of the assignees, and also against the owners of the real estate, to recover the amount of his demands; but in consequence of the absence of the Defendants no subpoena was served. In 1828, the Plaintiff in that suit having died in the mean time, his executors, the present Plaintiffs, filed a bill of revivor; but the Defendants being still out of the jurisdiction, no subpoena was served. In 1838, a second bill of revivor was filed, and subpoenas were served upon the Defendants, by means of an order obtained under the Statute 4 & 5 Will. IV. c. 82, which had

been enacted in the interval:—*Held*, that the real estate was charged with the amount of the promissory note as well as the costs.

Held, also, that the bar of the Statute of Limitation was saved by the filing of the bills in 1819 and 1828. *Forster v. Thompson.* 303

2. By indenture of marriage settlement, a power was given to the husband to appoint, by deed or will, the lands of Blackacre and Whiteacre, held under leases for lives renewable for ever, to any of the sons of the marriage, for any estate not exceeding an estate *quasi* in tail male. The husband made his will, and after reciting the power, in express execution thereof, devised the lands of Blackacre to a trustee to the use of his third son, *M.*, for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of *M.* in succession; and, in default of such issue, remainder over to the testator's sixth son, *N.*; and the testator then devised Whiteacre to his said sixth son, *N.*, for life, remainder to trustees to preserve, &c.; remainder to *N.*'s first and other sons, with remainders over. The donee of the power afterwards, by a codicil to his will, directed that in the event of the decease of his own eldest son without issue, the limitation of Whiteacre to *N.* should cease, and the lands should shift over to *M.* in tail male.

M., the third son, married in

1815, and by the deed of settlement then executed, after recitals of *M.*'s vested estate in Blackacre, and contingent interest in Whiteacre, all the lands were limited to *M.* for life, remainder to the first and other sons of the marriage in tail male, remainder, as to Whiteacre, to the daughters of the marriage, remainder, as to Blackacre, to *N.*, the sixth son, for life, remainder to his first and other sons in tail, with similar limitations to his brothers and their issue.

In 1816 the eldest son of the donee of the power died without issue, whereupon *M.* became entitled unto, but did not obtain possession of, Whiteacre.

There were two sons, issue of *M.*'s marriage in 1815. In 1827, *M.* married a second time, and by the articles, which were executed upon that occasion, he covenanted to settle the reversion, expectant upon the decease of his sons without issue, in all the lands, to the use of the first and other sons of that marriage in tail male, with remainder to the daughters of the marriage as tenants in common in fee. There was issue of this marriage, two daughters. The survivor of the sons, the issue of the first marriage, died in 1840, under age and unmarried, *M.*, their father, having died in 1835.

In 1841 a bill was filed by the daughters of *M.*, claiming both Blackacre and Whiteacre:—*Held*, that their right to the lands of

Whiteacre was barred by the Statute of Limitations, and that the parties claiming under the deed of 1815 were not estopped from disputing the right of the settlor to those lands. *Stackpole v. Stackpole.* 320

3. In the year 1818 *A.* entered into a contract with *B.* for the purchase of four denominations, and made an advance of 2000*l.* on account of the purchase-money. The treaty having been broken off, *A.* became an incumbrancer to the extent of the advance. In 1819, upon the occasion of the marriage of *B.*, by indenture of settlement, the four denominations were conveyed to trustees, as to two of them, to the uses of the marriage, in strict settlement; and as to the remaining two, upon trust to sell, whenever the settlor should require the trustees so to do, and apply the produce in payment of the several incumbrances enumerated in the schedule of the deed. *A.* was the third incumbrancer mentioned in the schedule, but neither he nor any of the other incumbrancers was a party to the deed. There never was any sale pursuant to the trusts of the deed:—

Held, that neither *A.* nor his representative, the Plaintiff in the second cause, was to be regarded as a *cestui que trust* under the deed of 1819, so as to be entitled to insist adversely on the execution of the trusts.

Interest on *A.*'s incumbrance to be computed from the period of six years prior to the filing of the bill.

Quære, whether the 25th section of the 3 & 4 Will. IV. c. 27, was intended to apply to the 40th and 42nd sections of the same Statute.
Law v. Bagwell. 398

MARRIAGE SETTLEMENT.

See ARTICLES.

COVENANT.

DEED.

PORTIONS.

POWER OF SALE.

MASTER.

See INQUIRY.

PRACTICE.

MERGER.

1. *A.* being entitled to the freehold lands of Blackacre and Whiteacre, in 1806 granted the former in mortgage, to secure an advance of 1000*l.*, and at the same time executed a collateral bond, upon which judgment was duly obtained, in Easter Term, 1806. This judgment was not revived until 1839, and was never redocketed under the 9 Geo. IV. c. 35. In 1829, *A.* granted to *B.* an annuity of 400*l.*, charged upon Whiteacre, and in 1833 died, having devised Whiteacre, subject to an annuity, to his wife, and all his other property to two trustees, upon trust to sell,

and, after payment of his debts, to make an equal distribution thereof among his younger children. One of the trustees died in his life-time, and the other refused to act. In 1834, there being a considerable arrear of head rent due upon Whiteacre, and the head landlord having brought an ejectment, *B.* paid off the arrear of rent, and the costs of the ejectment, and subsequently entered into a contract with the younger children for the purchase of Whiteacre, but died without having completed same; his widow and executrix, the principal Defendant, however, afterwards adopted the contract, and by a deed of the 29th of February, 1840, Whiteacre was conveyed by the younger children to the Defendant, *habendum* to her, her heirs and assigns, free from all incumbrances, except three judgments, one of which was the judgment of 1000*l.* above mentioned, and the annuity of 400*l.* The covenant in the deed against incumbrances, however, was general. The surviving trustee of the will, though named a party in the deed, never executed it. On a bill filed by the Plaintiff, who was entitled to the mortgage of 1806, and the judgment collateral, alleging that Blackacre was insufficient, and seeking to make good that deficiency, by means of the judgment, out of Whiteacre:—*Held*, that as the sale of Whiteacre was by the younger children, it was only the residue after payment of the debts

that was sold, and that, consequently, the lands in the possession of the Defendant were, notwithstanding the provisions of the Statute 9 Geo. IV. c. 35, liable to the judgment.

Held, also, that the sum paid by B. in his life-time, in discharge of the arrears of head rent, could not be set up as a charge ranking in priority to the Plaintiff, but that same had, in fact, become extinguished in the inheritance. *Garnett v. Armstrong*. 182

2. By a marriage settlement of the 9th of May, 1789, certain real estates, the property of the husband, were limited in trust for him for life, and after his decease to trustees, for a term of 1000 years, and subject thereto, to the use of the first and other sons of the marriage, with remainder to the husband in fee. The trusts of the term, which were for raising a sum of 8000*l.* as portions for the younger children of the marriage, were declared to take effect in case there should be one or more child or children of the said marriage, besides an eldest or only son.

There was no son of the said marriage, but only two daughters. Upon the occasion of the marriage of one of the daughters, the father covenanted to settle upon herself and her husband, and their issue, an annuity of 500*l.* per annum, and subsequently conveyed, in fulfilment of this covenant, a portion of the lands which were the subject of

the settlement of 1789, to trustees for a term of 300 years, to secure same. Upon the marriage of the second daughter, the father made a pecuniary provision for her, which was expressly declared to be in satisfaction of her portion under the settlement. The father, by his will, devised the estates, which were the subject of the settlement of 1789, to his two daughters, in the same manner as they would have come to them if he had died intestate :—

Held, upon the true construction of the settlement, that as there was no son of the marriage, the portions were not raisable.

Seemle, that even if the portions were raisable, the gift of the annuity to the daughter would have operated as a satisfaction of her share.

Seemle, that after the descent of the estates upon the two daughters, neither could support a claim against her sister's lands for her share of the portion.

The case of *Church v. Edwards* (2 Bro. C. C. 180) approved of. *Walcott v. Bloomfield*. 211

MINOR.

See COUNSEL.
INFANT.

MONEY.

See DONATIO MORTIS CAUSA.
LEGACY.

MORTGAGEE.

1. *A.* being indebted to the Plaintiffs in a sum of 400*l.*, and being entitled to a life estate in certain leasehold premises, conveyed, by deed of the 21st of November, 1837, his life interest therein to a trustee, upon trust, "out of the interest, proceeds, or annual rent thereof," to pay the head rent, to which the lands were subject, the premiums of insurance on a certain policy of insurance (which *A.* had effected upon his life, and which policy was assigned by a separate deed), and also to the said Plaintiffs the said sum of 400*l.*, with legal interest from the date thereof, at the rate of 6*l.* by the year, until the same should be fully paid off and discharged, and upon payment thereof, to reconvey the same to *A.* or his assigns. The deed did not contain any covenant for payment on the part of *A.*:—*Held*, upon the true construction of the deed of November, 1837, that the Plaintiffs were not to be considered as mortgagees, or entitled to a sale, but only to have a receiver, and the trusts of the deed carried into execution under the direction of the Court. *Taylor v. Emerson.* 117
2. In a suit by a prior mortgagee for a foreclosure and sale, the heir of the mortgagee of the equity of redemption is not a necessary party. *Whitla v. Halliday.* 267
3. Where a mortgagee unnecessarily files a bill for foreclosure, subse-

quently to the bankruptcy of the mortgagor, he will not get more costs than he would have been entitled to by proceeding in the matter of the bankruptcy. *Hogan v. Baird.* 296

4. A trader confessed a judgment to *A.*, and executed a mortgage to *B.*; the execution of the deed of mortgage was subsequent to the entering up of the judgment. The trader afterwards became a bankrupt:—*Held*, that the mortgage was to be paid in the first instance, and that the judgment was within the operation of the 6 Will. IV. c. 14, s. 126.

The case of a mortgage creditor stands on altogether a different footing from that of a purchaser. *White v. Baylor.* 297

See COSTS.

PRACTICE.

MOTION.

1. A decree stated, that the Defendant "waived all right of priority against the Plaintiff:—" *Held*, that the Court could not, upon motion, restrict the force of such comprehensive words, notwithstanding that it was represented, that these words were introduced in relation to a particular right of priority only. *Sheehy v. Lord Muskerry* (7 Clark & F. 1), observed upon. *Drought v. Jones.* 174
2. By the decree in the cause, the Plaintiff's right, under a settlement of the year 1804, to two-thirds of certain lands, was established, sub-

ject to the leases subsisting at the time of the settlement. *A.*, a third party, claiming a portion of these lands as a purchaser for valuable consideration, and without notice, under a lease made in the year 1881, by one of the Defendants, *G.*, who was entitled to the remaining one-third, applied after the decree, and upon undertaking to be bound by all the proceedings in the cause, he obtained an order, upon consent that the Master should inquire and report, whether he was entitled to any estate or interest in the lands in the decree mentioned: *Held*, that under this order, he could not set up his claim under the lease of 1881 against the Plaintiff, whose title had been established by the decree, and that he was not entitled to have the order varied or discharged, to enable him so to do.

The Court cannot relieve against a decree or order made upon consent, unless in case of misrepresentation.

A decree cannot be varied upon motion, without consent. *Peed v. Cussen.* 200

3. A party served with a notice of motion, though not interested in the subject matter of the motion, is yet entitled to the costs of appearing. *Tabuteau v. Warburton.* 267
4. Where a motion is properly moveable at the Rolls, it ought to be moved there, even though, if granted, it will have the effect of postponing a cause in the Lord Chan-

cellor's list of causes for hearing. *Crawford v. Scott.* 27

See COSTS.

DECREE.

PRACTICE.

NEW TRUSTEES.

See TRUST AND TRUSTEE.

NEXT OF KIN.

See LEGACY.

NOTICE.

See COSTS.

PRACTICE.

OBJECTIONS TO TITLE.

See TITLE.

ORDERS OF COURT.

See GENERAL ORDERS.

PARENT AND CHILD.

See PORTIONS.

PARTIES.

In a suit by a prior mortgagee for a foreclosure and sale, the heir of the mortgagee of the equity of redemption is not a necessary party.

It is not imperative upon the Plaintiff under the 47th General Order to set down the cause to be heard upon an objection for want of parties. If the objection be untenable, he may disregard it. *Whittle v. Halliday.* 26

See PRACTICE.

PAYMENT.

See COSTS.

SOLICITOR.

PENDENTE LITE.

See JUDGMENT.

PLEADING.

See AMENDMENT.

ANSWER.

COSTS.

DECREE.

DONATIO MORTIS CAUSA.

PARTIES.

POLICY OF INSURANCE.

See INSURANCE.

PORTIONS.

1. By a deed of settlement, executed on the occasion of the marriage of *B.*, certain lands, of which *A.*, the father of *B.*, was seised, as tenant for life, were conveyed to trustees, in trust to pay *B.* an annuity during the life of *A.*; and certain other lands, to which *A.* was absolutely entitled, were also conveyed, upon trust to permit *A.*, and his heirs and assigns, to receive the rents and profits thereof during *B.* (the son's) life, and subject thereto, to secure a jointure of 300*l.* for the son's intended wife, and to raise a sum of 4000*l.* as portions for the younger children of the marriage; and it was provided, that these portions should be divided among the younger

children, in such shares and proportions as *B.* should appoint, and in default of appointment, share and share alike, and should be payable to such of them as should be sons, at their ages of twenty-one years, and to such of them as should be daughters, at their ages of twenty-one years, or days of marriage, which should first happen, "if such respective times of payment should happen after the death of *B.*, but if before, then within three calendar months after the death of the said *B.*, and not before, or sooner, unless with the consent of the said *A.*, if living, and if dead, of the said *B.*, testified in writing under their respective hands and seals."

B., after the death of his father, *A.*, in pursuance of the power contained in this settlement, executed an appointment in favour of the Plaintiff, who was one of his younger children, and who had attained her age of twenty-one years, and directed such portion to be raised, and paid to her forthwith.

Upon a bill filed to raise the amount thereof:—*Held*, that the settlement authorized *B.*, the son, after the death of his father, to charge the lands with the portion in question, and to direct its immediate payment. *Keily v. Keily*.

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2. By a marriage settlement of the 9th of May, 1789, certain real estates, the property of the husband, were limited in trust for him

for life, and after his decease to trustees, for a term of 1000 years, and subject thereto, to the use of the first and other sons of the marriage, with remainder to the husband in fee. The trusts of the term, which were for raising a sum of 8000*l.* as portions for the younger children of the marriage, were declared to take effect in case there should be one or more child or children of the said marriage, besides an eldest or only son.

There was no son of the said marriage, but only two daughters. Upon the occasion of the marriage of one of the daughters, the father covenanted to settle upon herself and her husband, and their issue, an annuity of 500*l.* per annum, and subsequently conveyed, in fulfilment of this covenant, a portion of the lands which were the subject of the settlement of 1789, to trustees for a term of 300 years, to secure same. Upon the marriage of the second daughter, the father made a pecuniary provision for her, which was expressly declared to be in satisfaction of her portion under the settlement. The father, by his will, devised the estates, which were the subject of the settlement of 1789, to his two daughters, in the same manner as they would have come to them if he had intestate:—

Held, upon the true construction of the settlement, that as there was

no son of the marriage, the portions were not raisable.

Semble, that even if the portions were raisable, the gift of the annuity to the daughter would have operated as a satisfaction of her share.

Semble, that after the descent of the estates upon the two daughters, neither could support a claim against her sister's lands for her share of the portion.

The case of *Church v. Edwards* (2 Bro. C. C. 190.) approved of *Walcott v. Bloomfield*. 211

POUNDAGE.

See RECEIVER.

POWER, EXECUTION OF.

1. By a deed of settlement, executed on the occasion of the marriage of *B.*, certain lands, of which *A.*, the father of *B.*, was seised, as tenant for life, were conveyed to trustees, in trust to pay *B.* an annuity during the life of *A.*; and certain other lands, to which *A.* was absolutely entitled, were also conveyed, upon trust to permit *A.*, and his heirs and assigns, to receive the rents and profits thereof during *B.*'s (the son's) life, and subject thereto, to secure a jointure of 300*l.* for the son's intended wife, and to raise a sum of 4000*l.* as portions for the younger children of the marriage; and it was provided, that these portions should be divided among

the younger children, in such shares and proportions as *B.* should appoint, and in default of appointment, share and share alike, and should be payable to such of them as should be sons, at their ages of twenty-one years, and to such of them as should be daughters, at their ages of twenty-one years, or days of marriage, which should first happen, "if such respective times of payment should happen after the death of *B.*, but if before, then within three calendar months after the death of the said *B.*, and not before, or sooner, unless with the consent of the said *A.*, if living, and if dead, of the said *B.*, testified in writing under their respective hands and seals."

B., after the death of his father, *A.*, in pursuance of the power contained in this settlement, executed an appointment in favour of the Plaintiff, who was one of his younger children, and who had attained her age of twenty-one years, and directed such portion to be raised and paid to her forthwith.

Upon a bill filed to raise the amount thereof:—*Held*, that the settlement authorized *B.*, the son, after the death of his father, to charge the lands with the portion in question, and to direct its immediate payment. *Keily v. Keily*.

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2. By indenture of marriage settlement, a power was given to the

husband to appoint, by deed or will, the lands of Blackacre and Whiteacre, held under leases for lives renewable for ever, to any of the sons of the marriage, for any estate not exceeding an estate *quasi* in tail male. The husband made his will, and after reciting the power, in express execution thereof, devised the lands of Blackacre to a trustee to the use of his third son, *M.*, for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of *M.*, in succession; and in default of such issue remainder over to the testator's sixth son, *N.*; and the testator then devised Whiteacre to his said sixth son, *N.*, for life, remainder to trustees to preserve, &c.; remainder to *N.*'s first and other sons, with remainders over. The donee of the power afterwards, by a codicil to his will, directed, that in the event of the decease of his own eldest son without issue, the limitation of Whiteacre to *N.* should cease, and the lands should shift over to *M.* in tail male.

M., the third son, married in 1815, and by the deed of settlement then executed, after recitals of *M.*'s vested estate in Blackacre, and contingent interest in Whiteacre, all the lands were limited to *M.* for life, remainder to the first and other sons of the marriage in tail male, remainder, as to Whiteacre, to the daughters of the marriage, remainder, as to Blackacre,

to *N.*, the sixth son, for life; remainder to his first and other sons in tail, with similar limitations to his brothers and their issue.

In 1816 the eldest son of the donee of the power died without issue, whereupon *M.* became entitled unto, but did not obtain possession of, Whiteacre.

There were two sons, issue of *M.*'s marriage in 1815. In 1827, *M.* married a second time, and by the articles, which were executed upon that occasion, he covenanted to settle the reversion, expectant upon the decease of his sons without issue, in all the lands, to the use of the first and other sons of that marriage in tail male, with remainder to the daughters of the marriage as tenants in common in fee. There was issue of this marriage, two daughters. The survivor of the sons, the issue of the first marriage, died in 1840, under age and unmarried; *M.* their father, having died in 1835.

In 1841 a bill was filed by the daughters of *M.*, claiming both Blackacre and Whiteacre:—*Held*, that their right to the lands of Whiteacre was barred by the Statute of Limitations, and that the parties claiming under the deed of 1815 were not estopped from disputing the right of the settlor to those lands.

Held, also, that the *cy prés* doctrine may be applied to the execution of a power by will, and accor-

dingly, that the will of the testator in this case operated as a good appointment of Blackacre to *M.*, the third son, *quasi* in tail male. *Stackpole v. Stackpole.* 320

3. Where there is a power to appoint to and amongst children, though there is no appointment, nor any gift in default of appointment, yet by an implication arising from the terms of the power, there is a gift to the children living at the death of the donor as tenants in common. *Alloway v. Alloway.* 380

POWER OF ATTORNEY.

See AGENT.

SOLICITOR.

POWER OF SALE.

1. General powers of sale and exchange in a settlement are good. *Cole v. Sewell.* 1
2. In the year 1801, on the occasion of the marriage of *A.*, who was an infant, with *B.*, articles were executed, whereby it was provided, that certain estates, situate in England, to which *A.*, in common with her sisters, was entitled in remainder expectant upon the decease of her father, *M.*, who was tenant for life thereof, should, upon *A.*'s attaining her full age, be conveyed unto *N.* and *O.* upon trust for the husband and wife, and the younger children of the marriage; and by those articles it was provided that the trustees should have power, with the consent of *A.* and *B.*, "to sell the whole or any part of the

said lands of *A.*," and invest the produce in land or Government securities upon the trusts therein specified. In 1804, upon *A.*'s attaining her full age, a settlement was executed according to the provisions of the articles, and the power of sale therein contained, authorized the trustees to sell, with the consent of *A.* and *B.*, "the whole or any part of the said *A.*'s estate and interest" in the said lands: and *B.* covenanted that he and his wife *A.* would levy a fine to enure to the uses of the settlement.

In the year 1812, the estates in question, as well the remainder, as the tenancy for life, were sold, the tenant for life consenting to receive a proportion of the purchase-money equivalent in value to his life estate, according to the calculation of a notary. The sale was had without the intervention of the trustees, though with the full knowledge of one of them, *N.*, as it was alleged: and the share of the produce to which *A.* was entitled, amounting to 6330*l.* was subsequently laid out in personal securities.

In the year 1839, after the death of *N.*, upon a treaty between *O.*,¹ the surviving trustee, and *A.* and *B.* and the Plaintiff, who was the only younger child of the marriage, the Plaintiff, and *A.* and *B.*, for valuable consideration, released *N.* from all claim and responsibility in respect of the trusts of the articles

and settlement, and *N.* assigned to a new trustee for said parties the securities upon which the trust funds had been invested.

On a bill subsequently filed by the Plaintiff against *O.* and the personal representative of *N.* and others:—*Held*, that there was no breach of trust committed by the exercise of the power of sale in the life-time of the tenant for life, inasmuch as, upon the true construction of that power, such an immediate sale of the estate in remainder was fully warranted.

The sale in question ought to have been conducted by the trustees; but after so great a lapse of time, and there being no suggestion that the sale had been made at an undervalue, or that the produce was not forthcoming:—*Held*, that the bill could not be supported.

Generally speaking, where a sale has been made without the concurrence of the trustees, if the sale has been a proper one, and the trustees have adopted it, the Court will carry it into execution. *Blackwood v. Borrowes.* 441

PRACTICE.

1. Where there is a gift to a class of persons, and an inquiry becomes necessary to ascertain the persons entitled, the settled rule of the Court is to send it to the Master, in the first instance, to inquire who are individuals constituting that class. *Kimberly v. Tew.* 139

2. Trustees in the same interest may be allowed the costs of separate answers, if the Master shall find that the circumstances justified separate answers. *Dudgson v. Corley.* 158
3. A party served with a notice of motion, though not interested in the subject matter of the motion, is yet entitled to the costs of appearing. *Tabuteau v. Warburton.* 267
4. In a suit by a prior mortgagee for a foreclosure and sale, the heir of the mortgagee of the equity of redemption is not a necessary party. It is not imperative upon the Plaintiff, by the 47th General Order, to set down the cause to be heard upon an objection for want of parties. If the objection be untenable he may disregard it. *Whittle v. Halliday.* 267
5. When a motion is properly moveable at the Rolls it ought to be moved there, even though, if granted, it will have the effect of postponing a cause in the Lord Chancellor's list of causes for hearing. *Crawford v. Scott.* 273
6. The Court will not allow a receiver, who has not accounted within the time prescribed by the 148th General Order, his poundage, upon a consent signed by the guardians of minors interested in the funds. *Dease v. Reily.* 284
7. Counsel acting for a minor heir-at-law are justified in exercising their discretion, whether or not he ought to take an issue of *devisavit vel non.* *Knipe v. M. Mahon* 295
8. Where a mortgagee unnecessarily files a bill for foreclosure, subsequently to the bankruptcy of the mortgagor, he will not get more costs than he would have been entitled to by proceeding in the matter of the bankruptcy. *Hogan v. Baird.* 296
9. The Plaintiff is not entitled as of course to a decree against a party, as to whom the bill has been taken *pro confesso*; he is bound to make out his case, and establish his right to the relief sought. *Lloyd v. Lloyd.* 354
10. The Plaintiff, who was a married woman, but had been deserted by her husband, when he left the country, several years since, filed a bill as a *feme sole*, to enforce payment of a legacy to her, subsequently to the abandonment. There having been some evidence in the cause to shew that the husband was still alive, the Court at the hearing gave liberty to the Plaintiff to amend the bill by adding a next friend, and making her husband a Defendant, charging him to be out of the jurisdiction, and to have abandoned his wife. *Johnston v. Kirkwood.* 379

See ACCOUNT.

AMENDMENT.

COSTS.

DECREE.

INQUIRY.

MASTER.

PRIORITY.

1. A decree stated, that a Defendant "waived all right of priority against the Plaintiff:"—*Held*, that the Court could not, upon motion, restrict the force of such comprehensive words, notwithstanding that it was represented, that these words were introduced in relation to a particular right of priority only.

Drought v. Jones. 174

2. A trader confessed a judgment to *A.*, and executed a mortgage to *B.*; the execution of the deed of mortgage was subsequent to the entering up of the judgment. The trader afterwards became a bankrupt:—*Held*, that the mortgage was to be paid in the first instance, and that the judgment was within the operation of the 6 Will. IV. c. 14, s. 116.

The case of a mortgage creditor stands on altogether a different footing from that of a purchaser. *White v. Baylor* 297

PRO CONFESSO.

See DECREE.

PRACTICE.

PRO INTERESSE SUO.

See DECREE.

PURCHASE MONEY.

See POWER OF SALE.

TRUST AND TRUSTEE.

PURCHASER.

See VENDOR AND PURCHASER.

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REAL ESTATE.

See CHARGE OF DEBTS UPON REAL ESTATE.

RECEIVER.

1. *A.* being indebted to the Plaintiffs in a sum of 400*l.*, and being entitled to a life estate in certain leasehold premises, conveyed, by deed of the 21st of November, 1837, his life interest therein to a trustee, upon trust, "out of the interest, proceeds, or annual rent thereof," to pay the head rent to which the lands were subject, the premiums of insurance on a certain policy of insurance (which *A.* had effected upon his life, and which policy was assigned by a separate deed), and also to the said Plaintiffs the said sum of 400*l.*, with legal interest from the date thereof, at the rate of 6*l.* by the year, until the same should be fully paid off and discharged, and upon payment thereof, to reconvey the same to *A.* or his assigns. The deed did not contain any covenant for payment on the part of *A.*:—*Held*, upon the true construction of the deed of November, 1837, that the Plaintiffs were not to be considered as mortgagees, or entitled to a sale, but only to have a receiver, and the trusts of the deed carried into execution under the direction of the Court. *Taylor v. Emerson.* 117

2. The Court will not allow a receiver, who has not accounted within the time prescribed by the 148th Ge-

neral Order, his poundage, upon a consent signed by the guardians of the minors, interested in the funds.

Dease v. Reilly.

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REFERENCE.

See MASTER.

PRACTICE.

RELEASE.

See LEASE AND RELEASE.

TRUST AND TRUSTEE.

REMAINDER.

1. By a settlement, lands were limited to trustees, to the use of the settlor for life, with remainder, subject to a term of ninety-nine years, to the use of his three daughters, for their lives, as tenants in common, with remainder to trustees, during the life of each daughter, to preserve contingent remainders, with remainder as to the share of each daughter, at her death, to the use of her first and other sons successively in tail male, with remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor during their or her respective lives and life, with remainder in like manner, as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male, with remainder, in case all the daughters should die without issue male, as to the share of each, to the use of the

daughters as tenants in common in tail; and in case one or more of the daughters should die without issue, it was provided, that the share or shares of such daughter or daughters should go to the use of the daughters of such survivors or survivor, as tenants in common in tail general: the ultimate remainder was limited to the use of the settlor in fee:—

Held, that the limitation, in case of the failure of issue generally of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and not void for remoteness.

Held, also, that the words “survivors or survivor,” were to be read “others or other,” and, consequently, that the limitation over to the daughters of one of the settlor’s daughters who had issue, was not defeated by the death of that daughter in the life-time of another, who subsequently died without issue, but that the limitation took effect as a good cross remainder.

A limitation by way of remainder cannot be void for remoteness.

General powers of sale and exchange in a settlement are good.

Cole v. Sewell.

2. A testatrix bequeathed a sum of 300*l.* to her executors, in trust to place the same out at interest, and pay same, as it should fall due, to her nephew for life, and at his decease, “to divide the said sum, and any interest which might be due

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hereon, among all his children equally; and if he should leave but one, then to give the whole to said one child." There were two children of the nephew, both of whom died in his life-time:—

Held, that this was a gift to the father for life, with remainder to the children as tenants in common, with a gift over, in case there should be but one surviving child, to that child; and that as that event had not happened, the representative of the deceased children was entitled to the fund. *Kimberly v. Tew.* 131

See POWER OF SALE.

REMOTENESS.

See REMAINDER.

RENEWAL.

Bill for the renewal of a lease for three lives, containing a covenant for perpetual renewal, by the trustees of a marriage settlement, to whom the lease had been assigned upon certain trusts, dismissed with costs, the right of renewal being held to have been forfeited in consequence of the laches and neglect of the parties interested.

Where such a lease is in settlement, it is the duty of the trustees to make full inquiry as to the existence of the lives, and the state of the property; and it is no answer to the landlord insisting upon the forfeiture, to say, that all the communications which took place were

with the tenant for life, and that he alone ought therefore to be answerable for the delay.

Discussion upon the doctrine of waiver by a landlord of his rights. *Townley v. Bond.* 240

REPURCHASE.

See INSURANCE.

RESIDUE.

See LEGACY.

WILL.

REVOCATION.

See WILL.

SALARY.

See TRUST AND TRUSTEE.

SALE.

See MORTGAGE.

POWER OF SALE.

RECEIVER.

TRUST AND TRUSTEE.

VENDOR AND PURCHASER.

SATISFACTION.

By a marriage settlement of the 9th of May, 1789, certain real estates, the property of the husband, were limited in trust for him for life, and after his decease to trustees, for a term of 1000 years, and subject thereto, to the use of the first and other sons of the marriage, with remainder to the husband in fee. The trusts of the term, which were

for raising a sum of 8000*l.* as portions for the younger children of the marriage, were declared to take effect in case there should be one or more child or children of the said marriage, besides an eldest or only son.

There was no son of the said marriage, but only two daughters. Upon the occasion of the marriage of one of the daughters, the father covenanted to settle upon herself and her husband, and their issue, an annuity of 500*l.* per annum, and subsequently conveyed, in fulfilment of this covenant, a portion of the lands which were the subject of the settlement of 1789, to trustees for a term of 300 years, to secure same. Upon the marriage of the second daughter, the father made a pecuniary provision for her, which was expressly declared to be in satisfaction of her portion under the settlement. The father, by his will, devised the estates, which were the subject of the settlement of 1789, to his two daughters, in the same manner as they would have come to them, if he had died intestate:—

Held, upon the true construction of the settlement, that as there was no son of the marriage, the portions were not raisable.

Semble, that even if the portions were raisable, the gift of the annuity to the daughter would have operated as a satisfaction of her share.

Semble, that after the descent of

the estates upon the two daughters, neither could support a claim against her sister's lands for her share of the portion.

The case of *Church v. Edwards* (2 Bro. C. C. 180) approved of. *Walcott v. Bloomfield*. 211

SELECTION.

See POWER, EXECUTION OF.

SEPARATE ANSWER.

See ANSWER.

SEPARATE ESTATE.

See FEME COVERT.

SETTLEMENT.

See DEED.

FEME COVERT.

REMAINDER.

SURVIVOR.

TRUST AND TRUSTEE.

SOLICITOR.

1. Discussion of the principles upon which the Court acts, in directing the taxation of a solicitor's bill of costs, after the payment thereof.

A firm of solicitors were employed by an administrator, to recover a debt due to his intestate, and they had a power of attorney from the administrator, who was resident in England, authorizing them to receive moneys, and to act generally for him in all matters connected with the affairs of

the administration. The solicitors paid over to the administrator certain sums, which they received during the course of the proceedings, and retained the residue in payment of their costs; the costs were not delivered to the administrator during his life-time, but after his death, an account was furnished to his executors, by the solicitors, setting forth these costs, and applying, in payment thereof, the sums which they had retained out of the sums paid to them in the course of the proceedings, and from which it appeared that the costs incurred exceeded the sum retained by a sum of about 10*l*. In this account the executors acquiesced, although it did not appear that there ever had been any formal settlement of it; and there was no taxation of the costs:—*Held*, affirming the order of the Master of the Rolls, that an administratrix *de bonis non* of the intestate was entitled to have the bill referred for taxation, and that, under the circumstances, the settlement with the executors of the deceased was not a bar to such right.

A solicitor acting under the power of attorney from an administrator, or a person filling a fiduciary character, stands in the place of such person, and will be held answerable for any misapplication of the trust estate, to which he is a party.

If a trustee employ a solicitor, in relation to the trust estate, and

pay him the amount of his costs without taxation, the *cestui que trust* cannot require a taxation of the bill against the solicitor; but in the settlement of accounts with the trustee, he is entitled to have the bill of costs referred to be moderated; and upon such a reference the Master will revise the items in a way similar to taxation; and if the charges appear to be improper, they will be disallowed to the trustee, and he will be left to his remedy over against the solicitor.

Langford v. Nott (1 Jac. & W. 291) is overruled by the cases of *Balme v. Paver* (Jacob, 305), and *Vincent v. Venner* (1 Mylne & K. 212). *Lady Langford v. Mahony*.

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2. *A.* shortly before his death stated to the Defendant, who was his solicitor and land agent, that he intended to make him a present of 300*l*., and subsequently, being taken suddenly ill, he sent for the Defendant and desired him to retain that sum out of the balance in his hands. There was no third person present on either of those occasions, and on the day following the last conversation *A.* died. Upon the death of *A.*, in 1831, the Defendant informed *A.*'s executors of the gift, and assisted them in making out an account of the testator's assets, in which account the 300*l*. was treated as a gift by the testator in his life-time; and in the inventory returned to the Ecclesiastical

Court, and in the account settled in the Stamp Office, a like credit was taken.

In 1832, the Defendant, at the request of one of the executors, furnished an account, in which, among other things, he stated all the circumstances under which he claimed to be entitled to this sum of 300*l.*, taking credit for it against the balance in his hands, and seeking to retain the residue of said balance in discharge of certain costs due to him and his partner in a suit in the Exchequer, in which he had been employed for the testator in his life-time, and after his death for the executors, the amount of which costs, however, had not been ascertained. This account was retained by the executors, without any objection. Upon a bill filed by the executors in 1839 against the Defendant, for an account of the sums due by him as agent to the estate of the testator:—

Held, that the gift of the 300*l.* could not be supported: that the executors had not confirmed said gift, and were not precluded by any acquiescence from disputing same. *Walsh v. Studdart.* 159

STATUTES.

See BANKRUPT.

CHARITY.

LIMITATIONS, STATUTE OF.

SURVIVOR.

1. By a settlement, lands were limited

to trustees, to the use of the settlor for life, with remainder, subject to a term of ninety-nine years, to the use of his three daughters, for their lives, as tenants in common, with remainder to trustees, during the life of each daughter, to preserve contingent remainders, with remainder as to the share of each daughter, at her death, to the use of her first and other sons successively in tail male, with remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivor or survivors during their or her respective lives and life, with remainder, in like manner, as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male, with remainder, in case all the daughters should die without issue male, as to the share of each, to the use of the daughters as tenants in common in tail; and in case one or more of the daughters should die without issue, it was provided, that the share or shares of such daughter or daughters, should go to the use of the daughters of such survivors or survivor, as tenants in common in tail general: the ultimate remainder was limited to the use of the settlor in fee:—

Held, that the limitation in case of the failure of issue generally of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder and not void for remoteness.

Held, also, that the words "survivors or survivor," were to be read "others or other," and, consequently, that the limitation over to the daughters of one of the settlor's daughters, who had issue, was not defeated by the death of that daughter in the life-time of another, who subsequently died without issue, but that the limitation took effect as a good cross remainder.

A limitation by way of remainder cannot be void for remoteness.

General powers of sale and exchange in a settlement are good.
Cole v. Sewell. 1

SURVIVORSHIP.

See FEME COVERT.

TAXATION.

See COSTS.

SOLICITOR.

TENANT FOR LIFE.

See LEGACY.

TENANT IN COMMON.

1. A testatrix bequeathed a sum of 300*l.* to her executors, in trust to place the same out at interest, and pay same, as it should fall due, to her nephew for life, and at his decease "to divide the said sum and any interest which might be due thereon amongst his children equally, and if he should have but one, then to give the whole to said one child."

There were two children of the nephew, both of whom died in his life-time:—*Held*, that this was a gift to the father for life, with remainder to the children as tenants in common, with a gift over, in case there should be but one surviving child, to that child; and that, as that event had not happened, the representative of the deceased children was entitled to the fund. *Kimberly v. Tew.* 139

2. Where there is a power to appoint to and amongst children, though there is no appointment, nor any gift in default of appointment, yet by an implication arising from the terms of the power, there is a gift to the children living at the death of the donor as tenants in common. *Alloway v. Alloway.* 380

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VENDOR AND PURCHASER.

TRUST AND TRUSTEE.

1. A solicitor acting under a power of attorney from an administrator, or a person filling a fiduciary character, stands in the place of such person, and will be held answerable for any

misapplication of the trust-estate to which he is a party.

If a trustee employ a solicitor, in relation to the trust-estate, and pay him the amount of his costs without taxation, the *cestui que trust* cannot require a taxation of the bill against the solicitor; but in the settlement of accounts with the trustee, he is entitled to have the bill of costs referred to be moderated; and upon such a reference the Master will revise the items in a way similar to taxation; and if the charges appear to be improper, they will be disallowed to the trustee, and he will be left to his remedy over against the solicitor. *Lady Langford v. Mahony.* 81

2. Two persons, in whom were vested, under an Act of Parliament, the right to the tolls and profits arising from a certain road, for a term of fifty years, conveyed, by a deed of the 27th of May, 1827, the same, and all their estate and interest therein, to *A., B., and C.* (the Defendant) upon certain trusts therein mentioned; and subject thereto in trust for the said *A., B., and C.*, their executors, administrators, and assigns, as tenants in common, for their own use and benefit, for the residue of said term of fifty years; and the deed contained a provision, that in case any of the said trustees should be unable to join in the direction and superintendence of the said road, it should be lawful for any two of the said trustees to act

of themselves in the management of said road, and in all other things relating to the said execution of the said trusts. The interest, to which the said *A. and B.* were entitled under the said deed, having become subsequently vested in the Plaintiff, and *C.* (the Defendant) having taken upon himself the exclusive control and management of the road, and insisted upon his right thereto, and also upon being paid a salary for such his trouble and supervision:—*Held*, upon a bill filed by the Plaintiff, disputing such right, that the Defendant *C.* was entitled to the sole management of the road, but that his claim for salary could not be maintained. *Taylor v. Taylor.* 124

3. Trustees in the same interest may be allowed the costs of separate answers, if the Master shall find that the circumstances justified separate answers. *Dudgson v. Corley.* 156
4. Bill for the renewal of a lease for three lives, containing a covenant for perpetual renewal, by the trustees of a marriage settlement, to whom the lease had been assigned upon certain trusts, dismissed with costs, the right of renewal being held to have been forfeited in consequence of the laches and neglect of the parties interested.

Where such a lease is in settlement, it is the duty of the trustees to make full inquiry as to the existence of the lives, and the state

of the property; and it is no answer to the landlord insisting upon the forfeiture, to say, that all the communications which took place, were with the tenant for life, and that he alone ought therefore to be answerable for the delay. *Townley v. Bond.* 240

5. A testator in the year 1690, by his will devised and bequeathed certain properties therein mentioned for charitable purposes, but without naming any trustee or devisee. From the death of the testator to the present time the property was applied upon the trusts in the will specified. Upon a petition presented under the Statutes 52 Geo. III., c. 101, and 1 Will. IV., c. 60, stating such facts, and that the heir of the testator could not be discovered, the Court made an order, referring it to the Master to appoint new trustees and to approve of a proper person in the place of the heir of the testator to convey to such new trustees. *In the matter of Bishop Gore's Charity.* 270

6. In the year 1818, A. entered into a contract with B. for the purchase of four denominations, and made an advance of 2000*l.* on account of the purchase-money. The treaty having been broken off, A. became an incumbrancer to the extent of the advance. In 1819, upon the occasion of the marriage of B., by indenture of settlement, the four denominations were conveyed to trustees: as to two of them, to the

uses of the marriage, in strict settlement; and as to the remaining two, upon trust to sell, whenever the settlor should require the trustees so to do, and apply the produce in payment of the several incumbrances enumerated in the schedule of the deed. A. was the third incumbrancer mentioned in the schedule, but neither he nor any of the other incumbrancers was a party to the deed. There never was any sale pursuant to the trusts of the deed:—

Held, that neither A. nor his representative, the Plaintiff in the second cause, was to be regarded as *cestui que trust* under the deed of 1819, so as to be entitled to insist adversely on the execution of the trusts.

Interest on A.'s incumbrance to be computed from the period of six years prior to the filing of the bill.

Quære, whether the 25th section of the 3 & 4 Will. IV. c. 27, was intended to apply to the 40th and 42nd sections of the same Statute.

Law v. Bagwell. 398

7. In the year 1801, on the occasion of the marriage of A., who was an infant, with B., articles were executed, whereby it was provided, that certain estates, situated in England, to which A., in common with her sisters, was entitled in remainder expectant upon the decease of her father, M., who was tenant for life thereof, should, upon A.'s attaining her full age, be con-

veyed unto *N.* and *O.* upon trust for the husband and wife, and the younger children of the marriage; and by those articles it was provided that the trustee should have power, with the consent of *A.* and *B.*, "to sell the whole or any part of the said lands of *A.*," and invest the produce in land or Government securities upon the trusts therein specified. In 1804, upon *A.*'s attaining her full age, a settlement was executed according to the provisions of the articles: and the power of sale therein contained authorized the trustees to sell, with the consent of *A.* and *B.*, "the whole or any part of the said *A.*'s estate and interest" in the said lands: and *B.* covenanted that he and his wife *A.* would levy a fine to enure to the uses of the settlement.

In the year 1812, the estates in question, as well the remainder as the tenancy for life, were sold, the tenant for life consenting to receive a proportion of the purchase-money equivalent in value to his life-estate, according to the calculation of a notary. The sale was had without the intervention of the trustees, though with the full knowledge of one of them, *N.*, as it was alleged: and the share of the produce to which *A.* was entitled, amounting to 6330*l.* was subsequently laid out in personal securities.

In the year 1839, after the death of *N.*, upon a treaty between *O.*,

the surviving trustee, and *A.* and *B.* and the Plaintiff, who was the younger child of the marriage, the Plaintiff and *A.* and *B.*, for valuable consideration released *N.* from all claim and responsibility in respect of the trusts of the articles and settlement, and *N.* assigned a new trustee for said parties the securities upon which the trust funds had been invested.

On a bill subsequently filed by the Plaintiff against *O.* and the personal representative of *N.* and others:—*Held*, that there was no breach of trust committed by the exercise of the power of sale in the life-time of the tenant for life, inasmuch as, upon the true construction of that power, such an immediate sale of the estate in remainder was fully warranted.

The sale in question ought to have been conducted by the trustees; but after so great a lapse of time, and there being no suggestion that the sale had been made at an undervalue, or that the produce was not forthcoming:—*Held*, that the Bill could not be supported.

Generally speaking, where a sale has been made without the concurrence of the trustees, if the sale has been a proper one, and the trustees have adopted it, the Court will carry it into execution. *Blackwood v. Borrowes.*

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See COVENANT.

MORTGAGE.

POWER OF SALE.

VENDOR AND PURCHASER.

1. A tenant in tail, by indenture of settlement, executed upon the occasion of the marriage of his eldest son, reciting that he was seised in fee or in tail, conveyed the lands, as if he was seised in fee, to trustees for a term of 100 years, to secure a jointure for the intended wife of his son, in case certain other lands, on which it was primarily charged, should be sold; and subject to said term, to the use of himself for life, remainder to trustees for a term of 200 years, to raise portions for his younger children, and subject thereto to the use of his son for life, remainder to trustees to preserve, &c., remainder, subject to a third term of 300 years, to the first and other sons of his son in tail. No fine, recovery, or disentailing deed was levied, suffered, or executed by the father or by the son. A bill was filed to raise the portions for the younger children of the father, the settlor, and a decree was pronounced, directing a sale of the term of 200 years.

After the decree, the eldest son of the marriage, his grandfather being then dead, executed a disentailing deed, and subsequently, his father having died in the interval, conveyed the lands in fee expressly subject to the term, to a stranger to the suit, by whom, shortly afterwards, the fee was conveyed to the widow of the father, who was a

party to the suit, and against whom a decree upon sequestration had been obtained.

The term was sold, and the purchaser objected to the title; but the title was held good by the Master of the Rolls, and afterwards, upon appeal, by the Lord Chancellor.

Held, also, that the acts of the eldest son operated as a confirmation of the settlement.

Held, also, that the widow of the father having acquired her title after the decree, was bound out of that title to give effect to the decree.

Massy v. Batwell. 58

2. A trader confessed a judgment to A., and executed a mortgage to B.; the execution of the deed of mortgage was subsequent to the entering up of the judgment. The trader afterwards became a bankrupt:—*Held*, that the mortgage was to be paid in the first instance, and that the judgment was within the operation of the 6 Will. IV. c. 14, s. 126.

The case of a mortgage creditor stands on altogether a different footing from that of a purchaser. *White v. Baylor.* 297

3. A. being equitable tenant in tail of certain lands, some of which were fee-simple, and some held under leases *pur auter vie*, during the life-time of his father, the prior tenant for life, and before he obtained the actual possession of said lands, sold a portion of the leasehold interests, and by a contemporaneous deed conveyed the fee-

simple lands to the purchaser, by way of indemnity against all incumbrances affecting the purchased lands. *A.*, at the period of this transaction, was married to the Plaintiff; but no settlement had been executed upon the occasion of the marriage. In 1808, upon the death of his, *A.*'s, father, the legal fee descended upon *A.* In 1810, by a further deed executed between *A.*, of the one part, and trustees, in whom the estate of the vendee in the sale of 1804 was vested, of the other part, *A.* covenanted that in case the purchased lands should be made liable to pay the amount of the incumbrances affecting same, the trustees should be at liberty to resort to the indemnity lands, to be recouped thereof in all such sums, with interest and costs. In 1813, *A.* and his wife, the Plaintiff, executed a deed, whereby, after reciting that the Plaintiff had agreed to levy a fine to discharge her right of dower, and that *A.* had agreed to secure her a jointure or rent-charge in lieu thereof, *A.* conveyed the said indemnity lands and others, to the use of himself, his heirs, and assigns, discharged of all estates tail and of dower; and by the said deed he charged the said lands with an annuity of 200*l.* per annum, by way of jointure. *A.* having subsequently died, and the lands charged with the jointure having proved insufficient, in consequence of prior in-

cumbrances, the bill in the present cause was filed by the Plaintiff praying that she might be declared entitled to dower out of a portion of the estates of which *A.* was seised at the time of his death, in respect of the coverture, except as to the lands which had been sold subsequently to the deed of 1813.

Held, that as against the portion deriving under the vendee in the sale of 1804, that the Plaintiff's claim could not be sustained; that as against the heir-at-law, she was entitled to a decree.

If a man, before marriage, enters into a contract for the sale of a fee-simple estate, his subsequent marriage does not, in Equity, abate any right of dower. *Lloyd v. Lloyd*.

4. A vendor being seised in fee of lands subject to annuities, which she had granted to an attorney in consideration of advances made and incurred by him, agreed to sell the lands to the Plaintiff, stating that the grantee of the annuities would join in the conveyance. The deed of conveyance was executed by the vendor: the purchase money was not paid, but part was deposited with the attorney who had acted for the vendor on behalf of the Plaintiff, to remain in his hands until the lands were discharged from the annuities. The Plaintiff then called on the vendor to execute a deed of indemnity, which the parties declined to do.

for subsequently sold the lands to the grantee of the annuities, who gave actual notice of the Plaintiff's conveyance. On a bill filed to set aside the second sale:—*Held*, that the vendor was justified in treating the transaction between her and the Plaintiff as incomplete, and in selling to the grantee.

It was attempted to impeach the consideration of the annuities, but, —*Seemle*, such a question was not open to the Plaintiff. *Leader v. Ahearn*. 495

VOID AND VOIDABLE.

See FINE.

VENDOR AND PURCHASER.

VOLUNTARY DEED.

See DEED.

REMAINDER.

WAIVER.

See DECREE.

LANDLORD.

RENEWAL.

WILL.

A testatrix bequeathed a sum of \$3000 to her executors, in trust to place the same out at interest, and pay same, as it should fall due, to her nephew for life, and, at his decease, "to divide the said sum, and any interest which might be due thereon, among all his children equally; and if he should leave but one, then to give the whole to such

one child." There were two children of the nephew, both of whom died in his lifetime:—

Held, that this was a gift to the father for life, with remainder to the children as tenants in common, with a gift over, in case there should be but one surviving child, to that child; and that as that event had not happened, the representative of the deceased children was entitled to the fund.

In this case, a particular fund, which had been set apart during the life of the tenant for life, to answer the bequest, having risen in value, the Court held, that there had been such an appropriation of that fund in payment of the legacy, as to entitle the party, to whom the legacy was now payable, to the benefit of the increase. *Kimberly v. Tew*. 139

2. *A. B.* being indebted to her law agent in a considerable sum for costs, and also on a promissory note, by her will ordered, in the first instance, her debts to be paid as soon as conveniently might be after her decease; she then devised her real estate to her brother, and directed "that all costs and charges which might be due to her law agent" at the time of her decease, should be paid by her brother out of the rents of the real estate:—*Held*, that the real estate was charged with the amount of the promissory note, as well as the costs. *Forster v. Thompson*. 303

3. A testator, by his will, charged his estates with 6000*l.*, and directed "same to be paid to and among such of my younger children as shall survive my said wife, in such shares and proportions, and at such times after her death, as she shall direct by her will or deed." His wife, by her will, directed as follows: "*Robert* (the inheritor), give 3 of the 6000*l.* I wish to have given, to the two elder girrels":—*Held*, that the appointees of the 3000*l.* took as tenants in common, and not as joint tenants.

The power in this case was not a mere power of selection. The donee had the power of settling the fund to and amongst the children in any way she thought proper, and if she had intended to create a joint tenancy she had power to do so. *Alloway v. Alloway*. 456

4. A testator gave a surplus fund, constituted of the accumulation of certain rents issuing out of freehold and leasehold estates, to be divided in equal parts amongst all his children living at his death.

By a codicil the testator revoked the gift to *W.*, one of the children:

Held, that the share which had been given by the will to *W.*, belonged to the other children, and did not devolve to the heir-at-law and next of kin of the testator.

Cresswell v. Cheslyn (2 Eden.

123), was well decided. *Shaw v. M'Mahon*. 145

5. A testator gave his farm of *A.*, with the stock and one-third of his residuary property, to his grandson *X.*, and his farms of *B.* and *C.*, with the remaining two-thirds of the residue of his property, to his grandsons *Y.* and *Z.*, and bequeathed to his wife an annuity to be paid to her during her life, by his said three grandsons, share and share alike. The farms of *A.*, *B.*, and *C.* were held under terminable leases, and the testator declared, that his said grandsons, or their heirs, "on the fall of any lease, were to be equal sufferers, pursuant to their respective proportions." The testator, at the time of making his will, and at the time of his death, was also seised for two-lives of the farm of *Blackacre*, which passed under the will as part of his residuary property:—

Held, that on the fall of the leases, under which *A.*, *B.*, and *C.* were held, a purchaser of *Blackacre* would not be liable to a demand for contribution; for that the true construction of the clause, declaring that the grandsons were to be equal sufferers on the fall of any lease, was that which confined its operation to the leases specifically mentioned and devised by the will. *Spunner v. Dwyer*. 477





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